157-220

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 158.

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY AND SOLON HUMPHREYS AND THOMAS E. TUTT, AS RECEIVERS OF SAID COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MAY 11, 1891.

(14,634.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1894.

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1 Pleas in the circuit court of the United States of America for the northern division of the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, on Wednesday, the fifteenth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and fifteenth year.

WM. H. BRADLEY, *Clerk.*

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

In the matter of the intervening petition of the Pennsylvania Railroad Company.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-eighth day of May, 1884, came the Wabash, St. Louis and Pacific Railway Company, by its solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its ancillary bill of complaint in said entitled cause;

2 which said ancillary bill of complaint is in the words and figures following, to wit:

Ancillary Bill of Complaint.

In the Circuit Court of the United States for the Northern District of Illinois.

To the honorable judges of the circuit court aforesaid, in chancery sitting:

Humbly complaining unto your honors, the Wabash, St. Louis and Pacific Railway Company, a corporation organized and existing under the laws of the State of Missouri and a citizen and resident of said State, would respectfully represent—

That on or about the 27 day of May, 1884, your orator filed in the circuit court of the United States for the eastern district of Missouri a certain bill of complaint, accompanied by certain exhibits made parts thereof, in which your orator prays for the appointment of one or more receivers to take within their charge and operate, preserve, and protect all the property of orator lying within the States of Missouri, Iowa, Illinois, Indiana, Ohio, Michigan, and elsewhere.

That your orator is the owner of a number of lines of railway situated within said several States, and also is the lessee of certain other lines of railroad situated in the said States, all of said lines being united and forming a vast system of railroads.

That a portion of the lines of orator are situated in the district aforesaid and within the jurisdiction of this court, and your orator files herewith a true copy of the said bill of complaint so filed by orator in the circuit court for the eastern district of Missouri and prays that your honors will take the same as part of this bill of complaint, your orator making all the averments and showing unto your honors all the same facts as are fully set forth in the bill filed aforesaid.

Orator avers that all the statements of said bill are true, as it is informed and verily believes, and orator repeats the same herein, and also prays that all the exhibits accompanying said bill be also taken as a part of this bill of complaint.

Orator would further show that on the 27 day of May, 1884, the bill filed as aforesaid was presented to the honorable circuit court of the United States for the eastern district of Missouri, and upon motion of your orator Solon Humphreys and Thomas E. Tutt were duly appointed, by order of said court made in said cause, receivers of said railroad and all the lines and property of your orator, and that said receivers, as so appointed, executed a bond, as required by the said circuit court for the eastern district of Missouri, and complied with all the conditions under which they were so appointed such receivers, and entered upon the possession of all the property of orator within the jurisdiction of said circuit court for the eastern district of Missouri as such receivers, and are now seeking to reduce to their possession all the property of orator of every kind and description and all the rights, credits, and interests of orator in
4 the several States aforesaid and elsewhere; and in order that said receivers may be fully empowered to discharge their duties as such, orator prays your honors to take cognizance of this bill of complaint.

That your honors will also appoint the said persons, Solon Humphreys and Thomas E. Tutt, receivers of the property of orator within its jurisdiction in the same manner and to the same extent and with the same powers that are expressed in the order of appointment so entered by the circuit court for the eastern district of Missouri aforesaid, and orator files herewith a copy of the order of appointment so made by said last-mentioned court as a part of this bill of complaint; and orator makes the same defendant- in this cause that are named in said bill as aforesaid and prays process against the said defendants as in said bill it hath already prayed; and orator prays your honors to make such orders and decrees, preliminary and final, as are prayed for in said bill so filed by orator in the eastern district of Missouri, and that your honors also make all such other necessary orders, judgments, and decrees as may be required in aid of the said suits so commenced in the eastern district of Missouri.

Orator prays your honors to take ancillary jurisdiction with said circuit court for the eastern district of Missouri and to give to orator all the relief which may be necessary in accomplishing the purposes of the filing of said bill and giving force and effect to such orders as have been or shall be made in said cause by the circuit

court aforesaid of said eastern district of Missouri; and ora-
5 tor prays such other and further relief as may be necessary and to your honors may seem consistent with equity and good conscience; and orator, as in duty bound, will ever pray.

WAGER SWAYNE,
Solicitor for Complainant.

H. S. GREENE, *Of Counsel.*

STATE OF MISSOURI, } *ss:*
County of Jackson, }

Before me, a com'r of the U. S. circuit court, west. dist. Mo., in the county and State aforesaid, on this 27 day of May, A. D. 1884, at my office, in said county, personally appeared Wager Swayne, who, being by me duly sworn, made oath as follows: I, Wager Swayne, do hereby depose and say that I am now and have been for a long space of time one of the general solicitors of the Wabash, St. Louis and Pacific Railway Company and one of the officers of said company; that under my official relations with said company I am as well informed as to the facts and statements set forth in the foregoing bill of complaint as any other officer of said company; and I further say that all the averments and statements contained in said bill of complaint are true, as I am informed and verily believe; and further I say not.

WAGER SWAYNE.

Sworn and subscribed before me the day and year last above written.

WARREN WATSON,
Commissioner of the United States Circuit Court for the Western District of Missouri. [SEAL.]

[Endorsed:] Filed May 28, 1884. Wm. H. Bradley, clerk.

6 In the Circuit Court of the United States for the Eastern District of Missouri, of the —— Term, A. D. 1884.

To the honorable the judges of the circuit court aforesaid, in chancery sitting:

Humbly complaining to your honors, your orator, The Wabash, St. Louis and Pacific Railway Company, would respectfully represent that your orator is a body politic and corporate organized and existing under and by virtue of the laws of the State of Missouri and is a citizen and resident of said State.

That your orator owns a number of lines of railroads extending across the States of Missouri, Illinois, and Indiana, and also into the States of Ohio, Michigan, and Iowa, with branches extending in various directions within said States.

That orator was created a body corporate by the consolidation of certain other corporations organized and existing under the laws of the States of Missouri, Illinois, Indiana, and Ohio and owning and operating lines of railroad in said States.

That portions of the said lines so owned by your orator lie within the eastern district of Missouri, and your orator's principal office and the headquarters of its management are located in the city of St. Louis, in said district.

Further complaining, your orator further shows unto your honors that your orator is also the lessee of certain other lines of railroads located within the said several States, and your
7 orator has operated all of said lines as a unit until recently, when said lines were leased by orator to the St. Louis, Iron Mountain and Southern Railway Company, a corporation existing under and by virtue of the laws of the State of Missouri, and that said last-named company now operates all of said lines of railroad as the lessee of orator.

That by the terms of said lease said St. Louis, Iron Mountain and Southern Railway Company was required to pay, as rental of said lines, all the net earnings thereof to orator or on account of orator, but was not bound to pay or advance to or on account of orator any sum or sums in excess of such net earnings; all of which will more fully appear by reference to such contract of lease, made on exhibit, as hereinafter set forth.

Your orator further shows that several lines of railroad owned by orator, as distinguished from its leased lines, were acquired in part by consolidation and in part by purchase, and that while said lines were owned by other corporations prior to the acquisition of title thereto by orator each of said lines was incumbered by one or more mortgages or deeds of trust issued and executed by the companies owning the said lines prior to orator and intended to secure the payment of the bonded indebtedness of such companies, and that large numbers and amounts of such bonds so secured by liens on said portions of orator's lines are now outstanding and unpaid.

And because said mortgages or deeds of trust are very numerous your orator files as part of this bill of complaint a list thereof, showing the dates of said several instruments, the trustees named therein, the amounts secured thereby, the rates of interest and times when interest and principal mature upon the same, the several
8 companies by which said mortgages and bonds were issued, and the lines covered by each of said mortgages or deeds of trust, and also the amounts now unpaid thereon severally, and orator marks said list Exhibit A and prays that the same be taken as a part hereof.

And orator also embraces in said Exhibit A a statement of interest obligations assumed by orator and secured by mortgages or deeds of trust on its leased lines, the payment of such interest being conditions on which orator obtained such lines; and orator also files as parts of said Exhibit A copies of all such mortgages, deeds of trust, and leases as are necessary to the purposes of this bill (and which are not herein made distinct exhibits by themselves), so far as such copies are obtainable in time to be filed herewith, the original and record copies of some of said instruments not being within reach of orator within the time left to orator under the circumstances, which require the prompt filing of the bill of complaint,

but orator will, as soon as possible, file copies of all such instruments, so far as necessary, and prays that when filed the same be taken as parts hereof; and orator marks all such copies of instruments as are filed herewith and are not distinct exhibits by themselves Sub-exhibits A and numbers the same consecutively for easy identification.

And orator further shows that after your orator had acquired title to the greater portion of the lines of railroad aforesaid, to wit, on the first day June, 1880, your orator executed to the Central Trust Company of New York, a corporation existing under the laws of the State of New York, and which then was and still is a citizen and resident of said last-named State, and to James Cheney,
who then was and still is a citizen and resident of the State
9 of Indiana, as trustees, a certain mortgage or deed of trust,
to which orator prays leave to refer as the "general mortgage." The said general mortgage was intended to secure an issue by orator, for the purposes therein expressed, of bonds to the amount of fifty million dollars, payable in gold coin on the first day of June, A. D. 1920, with interest at the rate of six per cent. per annum, payable on the first days of June and December of each year; and orator files herewith a true copy of said general mortgage, marked Exhibit B, and prays that the same, together with the certificates attached thereto and the copy of bonds embraced therein, be taken as part of this bill as fully as if incorporated in the body thereof.

Further complaining, your orator also showeth that said general mortgage embraced all the lines of railroad then owned by orator, and also all its interest in all other lines and property then owned or thereafter to be acquired, and also all rents, issues, and profits derived by orator from said lines of road, and all leasehold interests then owned or thereafter to be acquired by orator.

And said mortgage further embraced all credits and choses in action accruing to orator and all the franchises of orator, but said mortgage or deed of trust so placed upon said property was by the terms thereof expressly made subject and inferior to all such prior liens as were charged upon the several portions of said road and the equipments thereof, and to the estate and lien of such specific trust- and mortgages and other obligations as might thereafter be made
and charged upon any property which might thereafter be
10 acquired by orator, and which trusts so charged should form
part of the purchase-money or conditions of the acquisition of such after-acquired property by your orator. Your orator shows that under the terms of said mortgage bonds were issued, negotiated, and sold for value by orator to the amounts stated in said Exhibit A, and that interest is accruing and will fall due thereon as shown by said exhibit.

Your orator further states that said general mortgage was duly executed, acknowledged, and recorded as required by law, and that the bonds so issued as aforesaid were duly certified by the trustees named in said mortgage according to the terms and conditions thereof. Further complaining, your orator showeth that on the 10th day of April, A. D. 1883, your orator executed and de-

as aforesaid orator induced a number of persons of high financial standing to become indorsers of said notes, and by means of a credit given by such indorsements orator was enabled to negotiate said notes for value and received the proceeds thereof, and orator shows unto your honors that there will be due on said promissory notes at maturity about the sum of two millions two hundred thousand dollars.

Orator further shows unto your honors that the several persons aforesaid by whom orator's notes were endorsed as aforesaid are partially secured with respect thereto by a pledge of bonds secured by said collateral trust to the nominal amount set forth in Exhibit A aforesaid, and to that extent said persons have a lien upon all the property embraced in said collateral trust, including the bonds, stocks, rolling stock, engines, and real estate specified in said collateral trust.

And orator further showeth unto your honors that orator is now indebted to said St. Louis, Iron Mountain and Southern Railway Company for money advanced over and above the net earnings of orator's leins, leased as aforesaid, on about the sum of $1,150,091.30 of principal, with interest accruing thereon, and that said sum of principal and the interest thereof is secured by bonds issued as aforesaid and secured by said collateral trust. Your orator further showeth that by reason of the failure of the crops aforesaid and the enormous expenses imposed upon orator by the recurrence of extreme freshets as aforesaid and by reason of the cost of completing its lines as aforesaid a large floating debt has accumulated against your orator, amounting in the aggregate to about the sum of 4,784,145.01 dollars.

That a portion of said indebtedness is represented by small judgments, and the greater portion is distributed among a vast number of persons, all or nearly all of whom are pressing orator for payment and threatening and, as orator alleges upon information and belief, intending to resort to every legal method of enforcing the collection of the said claims; that orator is largely indebted to a number of other railroad companies on balances arising from an exchange of business. The exact amount of said indebtedness is not known to orator, as the total thereof is continually changing; but orator avers that payment of said balances within a reasonable time is necessary to the preservation of the business of orator in exchange with such other companies, and if the amount of such exchange balances due from orator shall not be promptly paid many of said companies connecting and exchanging business with your orator will withdraw their business and exchange of traffic and thus greatly reduce the income and impair the earnings of orator; that such balances were received by orator in trust for the several companies entitled to the same.

Your orator would further show that by the terms of nearly all, if not quite all, the mortgages and trust deeds aforesaid, whether executed by orator or by other companies on any portions of said lines prior to the time when orator acquired the same, not only embracing the roads and tangible property of the companies execut-

ing said instrument, but also the revenues and incomes to be
16 derived from the use of the parts of said roads so mortgaged and the holders of the bonds secured by said mortgages have always insisted upon their rights to look to the revenues of the sections of the railroad upon which the mortgages rested as means of paying and discharging said bonds; that all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the companies executing such mortgages, but that, as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock *and* on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road or according to said several mortgages, and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty and would result in great loss to all persons interested in said rolling stock or in orator's property or securities.

Further complaining, your orator would show to your honors that the directors and officers of your orator's company have thoroughly considered and already resorted to all proper measures for obtaining the means with which to pay the floating indebtedness of said company, and also to meet the large amounts of accruing interest which will fall due at the beginning of the month of June next and continue to mature by installments at very short intervals; but, may it please your honors, so it is that said officers and directors have hitherto wholly failed to provide the means with which to discharge said floating indebtedness and to
17 meet said accruing interest; that your orator is powerless now to accomplish such purpose, and for the time being, at least, is practically insolvent; that, in spite of all the exertion of orator and its officers, it is now certain that a default in the payment of interest maturing in June next will occur, and that orator will also be without means of meeting its floating indebtedness.

Your orator further showeth unto your honors that several of the leasehold interests possessed by orator are of extreme importance, as some of the lines so leased form valuable links in the chain of your orator's lines—as, for instance, a leas-hold interest under the Western Indiana Railroad Company, by means of which orator reaches its terminus in the city of Chicago and is enabled to do its valuable business there.

That under the terms of said leases the lessor companies will be enabled to declare a forfeiture of orator's rights unless promptly paid the rentals accruing therefor, and that unless some provision is made by which such rentals as may shortly mature can be promptly met your orator's leas-hold interests, or some of them of great value, will be declared forfeited and wholly lost to orator and orator's lines and power of earning money will be thereby very seriously affected.

And orator further alleges that a large portion of the rolling stock in use by orator and necessary to the transaction of its busi-

ness is held under conditional contracts of purchase, the title to such property not vesting in orator until fully paid for, and orator is liable to lose said property and to a forfeiture of the amount already paid thereon if it should make default in making
18 further payments for such rolling stock as such payments mature. Your orator further showeth unto your honors and avers upon information and belief that as soon as default shall be made in the payment of bonded interest maturing early in the month of June next a large number of suits will be commenced at law in the numerous State courts along the lines of orator's road, and that orator's supplies, materials, rolling stock, and other personal property will be seized under execution and attachment and your orator thereby deprived of the means of operating its road; that such a result would be almost, if not quite, ruinous to the prospects of orator with reference to earning a revenue, and more particularly disastrous because the present promise of an excellent crop in the West offers strong hope that a large revenue will be earned by orator or by the use of orator's lines of road in the near future; but if orator's rolling stock, materials, and supplies be seized under execution and attachment (as they undoubtedly will unless protected by the action of the court of equity) the benefits of moving the now growing crop and the large revenues to be fairly hoped for as arising from such traffic will be lost, not only to orator, but to all persons interested in orator's railroads and property.

And, further complaining, your orator also shows and alleges upon information and belief that, unless protected by a court of equity, as soon as the anticipated default aforesaid in the payment of interest shall occur a number of suits will be commenced in the State or Federal courts held near the lines of orator's railroad for
19 the appointment of receivers under the original sectional mortgages executed by the several corporations on portions of orator's lines before acquired the same; that in that event orator's lines of road will be broken into fragments; that the unity of orator's system of roads will be entirely destroyed; that orator will be prevented from realizing a revenue from the use of its lines, and that in all probability orator's roads will be sold in small sections, so that it will be impossible to re-establish the unity thereof now existing; and orator avers that the interests of orator in said road and of all its creditors and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery.

That if said lines of railroad are broken up, as aforesaid, and the fragments thereof placed in the hands of various receivers and the rolling stock, materials, and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof; and in order that the extent and location of orator's lines of railroad may be better known, orator files a map showing the location of said

lines and the States wherein they are situated and marks said map Exhibit G and prays that same be taken as a part of the bill of complaint.

And, further complaining unto your honors, your orator would also show that your orator is now indebted in very large
20 sums of money to a multitude of laborers who have little to live upon other than the fruits of their daily labor; that orator cannot state the amount of money so due to laborers, but avers it to be large, and that if payment of such indebtedness be not made, or at least secured by the action of court of equity by preventing the disruption of said property and the wasting of orator's assets, great and widespread suffering will ensue to said laborers and irrep-rable injury be thereby produced.

And your orator further showeth unto your honors that your orator and its board of directors, conceiving that it was their duty to protect said property and to treat the same as a trust fund for the security, first, of its creditors, and then of orator's stockholders, have determined to appeal to your honors, sitting in chancery, to take possession of the said lines of road, through the instrumentality of one or more receivers, and thereby to prevent the breaking up of said lines of road and the scattering abroad of its assets in the manner above indicated; and orator alleges upon information and belief that it is the intention of the trustees named in the general mortgage aforesaid, as soon as the impending default aforesaid shall occur and as soon as they may lawfully act under the terms of their trust, to proceed to foreclose the said general mortgage, and they intend to take steps in your honors' court for that purpose, and orator on information and belief states that said trustees intend to proceed in this cause by means of a cross-bill to accomplish the said result above mentioned, but before said trustees could, under the terms of their said trust, file either an original bill or cross-bill herein and on their motion obtain the appointment
21 of a receiver or receivers the evil results apprehended by orator and described as aforesaid will certainly occur and the property aforesaid, real and personal, will be broken up, the unity of orator's system destroyed, and its equipment scattered abroad.

Inasmuch as orator has not an adequate remedy at law in the premises, it prays your honors to take cognizance of this bill of complaint; that in order to the preservation of the interests of a large numbers of persons, stockholders, and creditors unknown to orator and in order to the protection of the interests of all concerned and to prevent a great multiplicity of suits your honors will appoint one or more receivers and empower and direct such receiver or receivers to take possession of said entire property and to preserve, operate, and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed.

That on a final hearing of said cause your honors will under this bill, or under such amendments as may be made thereto, or such supplemental bills as shall be filed herein, or such cross-bills

as parties in interest may also file, decree the sale of said entire property, whether such decree shall judicially foreclose said general mortgage or any of the other mortgages aforesaid or whether such decree shall dispose of said property as a trust fund on general equitable principles; that your honors will cause all the liens upon said property or any part thereof and all rights, claims, and
22 equities of all persons interested therein — be ascertained, defined, and determined, and that the proceeds arising from the sale of such property or any part thereof be applied under the orders and decrees of this court according to the rights, interests, and equities of parties or persons interested in said fund.

Orator would further show that the moneys derived from the promissory notes as aforesaid, indorsed as aforesaid, were applied to the payment of interest accruing on bonds secured by the mortgages aforesaid prior and superior to the bonds secured by the general mortgage aforesaid and also to the payment of maturing installments of the purchase-money of rolling stock necessary and indispensable to the use of orator's road, which payment was necessary in order to prevent the forfeiture of orator's interest in said rolling stock and its right to the use and possession thereof.

And orator would further show that the said collateral trust which said endorsers have a right to rely upon as indemnity to them embraces a large amount of valuable rolling stock necessary to the operation of orator's lines of road, and it also embraces very valuable terminal facilities in the city of Chicago and in the other cities aforesaid, by means of which orator is enabled to transact its important business in said cities and without which orator would be unable to maintain its growing trade in said cities; that it is now and will continue to be very important to orator that such receiver or receivers as your honors may appoint should prevent the foreclosure of said collateral trust and the loss of orator's terminal facilities aforesaid in the city of Chicago and said other cities
23 and the taking from orator of the valuable rolling stock embraced in said collateral trust, and your orator therefore specially prays your honors to make such preliminary orders or decrees or such orders and decrees as can be made at a very early date enabling such receiver or receivers to protect the endorsers upon said promissory notes of orator and thereby to prevent the foreclosure of said collateral trust and the loss of the rolling stock and terminal facilities hereinbefore last mentioned.

Orator also prays that such orders be made as would enable such receiver or receivers to raise money with which to pay all rentals, accrued or accruing, the payment of which are necessary to prevent the forfeiture of orator's valuable leasehold interests, and thus prevent the breaking up of orator's lines.

That your honors will order and direct that said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, rentals, and services aforesaid, and also after protecting the endorsers aforesaid and thus preventing the forfeiture of orator's interests, rights, and property embraced in said collateral trust, and also after paying such claims

as require to be paid in order to prevent a forfeiture of orator's rights and interests in all rolling stock and equipments, apply the residue or surplus of all incomes, revenues, and earnings of said railroads and all other assets coming into their hands as such receivers to the discharge of all debts, obligations, and liabilities of orator according to the rights and legal and equitable priorities of all concerned as creditors or otherwise under the direction of the court.

24 And orator hereby makes defendants the following persons and corporations:

The Central Trust Company of New York, as aforesaid, the same being a citizen and resident of the State of New York as aforesaid, and James Cheney, a citizen and resident of the State of Indiana as aforesaid, trustees under said general mortgages; also The St. Louis, Iron Mountain & Southern Railway Company, being a citizen and resident of the State of Missouri as aforesaid; also The Mercantile Trust Company of New York, the same being a citizen and resident of the State of New York as aforesaid; also the following persons and corporations:

The Farmers' Loan and Trust Company of New York, a corporation organized under and by virtue of the laws of the State of New York; James R. Jessup, John T. Terry, Daniel A. Lindley, Alfred T. White, H. F. Spaulding, Wager Swayne, Lewis H. Meyer, J. P. Giraud Foster, Clifford A. Hand, Robert C. Martin, George P. Gould, George S. Coe, George T. Davis, George I. Seney, John Paton, all of whom are citizens and residents of the State of New York; Solon Humphreys, a citizen and resident of the State of New Jersey; Archibald Hopkins, a citizen and resident of Washington, D. C.; John M. Woodson, James B. Eads, H. F. Vail, and Charles Parsons, all of whom are citizens and residents of the State of Missouri; James Cheney, Abraham W. Hendricks, who are citizens and residents of the State of Indiana; H. W. Ford, R. S. Bock, G. E. Leighton, Thomas B. Coulter, P. H. Brown, R. A. Betts, George M. Rice, J. Kimball, E. P. Burnham, J. A. Jamison, The Eel River Railroad Company, a corporation of the State of Indiana and a citizen and resident of said State; The Toledo, Peoria & Western Rail-

25 road Company, a corporation of the State of Illinois and a citizen and resident of the same; The Boone County & Booneville Railroad Company; St. Louis, Ottumwa & Cedar Rapids Railroad Company; The St. Joseph & St. Louis Railroad Company; The Brunswick & Chillicothe Railroad Company; St. Louis, Council Bluffs & Omaha Railroad Company; St. Louis, Kansas City & Northern Railway Co., a citizen and resident of the State of Missouri; Des Moines & St. Louis Railroad Company; St. Louis, Jerseyville & Springfield Railroad Company, a corporation of the State of Illinois and a resident and citizen of said State; Des Moines & Northwestern Railroad Company, a corporation, citizen and resident of State of Illinois; Champaign & Southeastern Railroad Company; The St. Louis Bridge Co.

Your orator would show that all the above-named defendants have or claim to have interests in the lines of your — as lessors,

mortgagors, or trustees, under deeds of trust covering your orator's said lines or portions thereof.

And orator would further show upon information and belief that George Griswold and L. R. Tilton were cotrustees with James R. Jessup under the deed of trust mentioned in Exhibit A, made by the Illinois & Southern Iowa Railroad Co. in March, 1862, and that said Griswold and Tilton have departed this life; also that Edwin D. Morgan, sole trustee of two of the mortgages mentioned in Exhibit A attached to this complaint, has departed this life.

That Orville H. Browning, cotrustee of Solon Humphreys under the mortgage made by Quincy, Missouri & Pacific Railroad Co. in October, 1879, has also departed this life, and that H. F. Vail,
26 cotrustees with Charles Parsons under the mortgage of the St. Charles bridge of October, 1878, has, as orator is informed and believes, also departed this life.

And *the* orator prays your honors to appoint successors to said trustees so deceased for the proper execution of their several trusts, or to make such other order with respect thereto as will cause said trusts to be properly represented in the matters of this litigation.

Orator prays that all the defendants aforesaid and all such trustees as your honors may appoint be required to set up their several interests so that the same may be fully represented in this cause.

And your orator avers that there is in this cause a dispute and controversy wholly between your orator and the said trustees under said general trust mortgage, and there is also a separate dispute and controversy in this cause wholly between orator and the trustees under the said several other mortgages herein set forth, and that such controversy may be determined as between orator and the trustees under each of said mortgages without reference to the other defendants herein.

Your orator prays that the said defendants and each of them may be required by a writ of subpœna to be and appear before your honors in the court of chancery on the first day of the next term of this court, or as soon thereafter as proper service may be had upon them or either of them; that said defendants and each of them be required to answer this bill of complaint, but not upon oath, answer upon oath being hereby expressly waived.

27 That this court direct all persons and all corporations being possessed of the property of orator or any part of it to surrender the same to such receiver or receivers as your honors may appoint or to hold such property or portions of property under said receiver or receivers if the latter shall elect to pursue such course; and your orator states further to your honors that it is the intention of orator, as soon as a receiver or receivers shall be appointed as aforesaid and as soon as your honors have acquired primary jurisdiction of said cause and said property, to file like bills in the circuit courts of the United States of each of the districts into which such lines extend, praying such courts to take ancillary jurisdiction of said cause and to aid your honors in administering said property and disposing of the same according to the rights of all parties.

Orator further represents to your honors that it will become very important to the interest of your orator and its creditors that the operation of orator's lines of road should not be interrupted, and that business relations with other lines of railroad and with all persons engaged in the practical operation of orator's lines should be maintained and preserved, and to that end it will be necessary and important that the balance due to other lines of road and amounts due laborers, employees of various kinds, attorneys and others performing professional services for orator, and also all claims for supplies and materials furnished orator should be met and paid; otherwise it is very probable that a large number of laborers and other employees will suddenly abandon the service of orator, and persons who have been furnishing materials and supplies to orator
28 will suddenly cease to furnish the same; and therefore orator prays your honors to direct such receiver or receivers as may be appointed herein out of the earnings of said road or out of any moneys available to pay all such unsatisfied claims for current expenses, supplies, labor, exchange of traffic and professional services, and that such payments include all the claims of the character aforesaid accruing or maturing within a reasonable time before the filing of this bill. Orator further shows unto your honors that by reason of the number of defendants herein and by reason of their residences being in many instances far apart and by reason of the pressing need of the appointment of a receiver to prevent the disastrous consequences hereinbefore indicated orator has not been able to serve notices upon all of the defendants of the application intended to be made for the appointment of a receiver or receivers, but orator has caused notice thereof, together with a copy of this bill, to be served on the trustees aforesaid of the *the* Central Trust Company of New York and defendant Cheney, who represent the largest interest and most important creditors of orator, and orator has also caused like notice to be served upon the defendant.

And orator prays your honors to make such order in the premises as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers with or without notice, as such receivers' possession will enure to the benefit of all the persons concerned.

29 And your orator prays such other and further relief as the nature of its case may demand and as shall seem to your honors consistent with equity and good conscience; and your orator, as in duty bound, will ever pray, &c.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

(Signed) WAGER SWAYNE, *Solicitor for Complainant.*

H. S. GREENE, *Of Counsel.*

STATE OF NEW YORK, }
County of New York. }

Before me, William J. Harding, a notary public in and for the county and State aforesaid, on this 22d day of May, A. D. 1884, at my office, in said county, personally appeared A. L. Hopkins, who, being by me duly sworn, makes oath as follows:

I, Amos L. Hopkins, do hereby depose and say that I am now and have been for a long space of time vice-president of the Wabash, St. Louis and Pacific Railway Company and one of the executive officers of said company; that under my official relations with said company I am as well informed of the facts and statements set forth in the foregoing bill of complaint as any other officer of said company.

And I further say that all the averments and statements contained in said bill of complaint and in the bill made part thereof are true, as I am informed and verily believe, and further I say not.

(Signed) A. L. HOPKINS.

30 Sworn and subscribed before me the day and year last above written. Witness my hand and notarial seal.

[SEAL.] (Signed) WM. J. HARDING.
Notary Public, Kings County.

Certificate filed in New York county.

(Endorsed:) Filed May 28, 1884. Wm. H. Bradley clerk.

31 On the same day, to wit, on the twenty-eighth day of May, in the adjourned May term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Now, on this twenty-eighth day of May, A. D. 1884, comes the said complainant, by its solicitor and counsel, and filed its ancillary bill of complaint, together with a copy of its original bill and the exhibits referred to therein; and also a copy of the order of the circuit court of the United States for the eastern district of Missouri, wherein said original bill was filed, made in the premises: It is now, on consideration of the premises, ordered that the order aforesaid of the circuit court of the United States for the district of Missouri be approved, and that it be taken and held to be the order of this court, except as to the requirement of a bond therein mentioned, and as to the matter of said bond this court reserves to itself the
32 power hereafter to require, in its discretion, a bond from the receivers named in said order of the court in said case in the

eastern district of Missouri; and it is further ordered that said receivers, on complying with the terms of said order made in said original case by the United States circuit court for the eastern district of Missouri, do proceed to take possession of all and singular the railroads, rights, property, and franchises of the said complainant within the State of Illinois.

And this court further reserves to itself the power to make such further orders in the premises as may seem to be necessary.

Afterwards, to wit, on the thirteenth day of June, 1884, came The Central Trust Company of New York and James Cheney, trustees, by their solicitors, and filed in said clerk's office their ancillary cross-bill in said entitled cause; which said ancillary cross-bill is in the words and figures following, to wit:

33 In the Circuit Court of the United States for the Northern District of Illinois.

To the honorable the judges of the circuit court aforesaid, sitting in equity:

Humbly complaining, show unto your honors your orators, The Central Trust Company of New York, a corporation created by and existing under the laws of the State of New York, and James Cheney, a resident and citizen of the State of Indiana—

That heretofore, to wit, on the 27th day of May, 1884, the Wabash, St. Louis and Pacific Railway Company, a corporation created by and existing under the laws of the State of Missouri and a citizen and resident of that State, filed in the circuit court of the United States for the eastern district of Missouri a certain bill of complaint, stating and setting forth, among other things, that it was the owner of extensive and valuable lines of railway and other property situated within the several States of Missouri, Iowa, Illinois, Indiana, Ohio, and Michigan and elsewhere, and was also the lessee of certain other lines of railway situated in the said States, all of said lines being united and forming a vast system of railroads; that it was for the time practically insolvent and unable to pay its maturing obligations, and praying, among other things, for the appointment of a receiver or receivers to take charge of and operate, protect, and preserve its property.

34 That a portion of the said lines of railway is situated in this district and within the jurisdiction of this court, and the said railway company, immediately after the filing of said bill in the eastern district of Missouri, filed in this district its ancillary bill referring to said original bill and to a true copy thereof annexed to said ancillary bill, repeating the averments therein contained, and setting forth the appointment by the said circuit court of the United States for the eastern district of Missouri of Solon Humphreys and Thomas E. Tutt as receivers of said railroad and property, and by said ancillary bill said railway company prayed that your honors would take cognizance thereof and appoint the said persons receivers of the property of said railway company within the juris-

diction of this court and would take ancillary jurisdiction with said circuit court for the eastern district of Missouri and give all relief necessary to accomplish the purposes of filing said bill and giving force to the orders of the said last-mentioned court.

Your orators further show that they are named as parties defendant to said original and ancillary bills, and that they are so named as the trustees of the mortgage made by the said Wabash, St. Louis and Pacific Railway Company, bearing date June 1, 1880, known as its "general mortgage," covering the greater part of its railroad and property. Your orators respectfully refer to the said ancillary bill and the copy of said original bill for a more particular statement of their contents, and for the terms and conditions of said general mortgage they respectfully refer to the copy thereof which is filed with said bill, marked "Exhibit B."

35 Your orators further show that for the purpose of protecting their rights and interests as trustees under said general mortgage and the rights and interests of the owners and holders of the bonds and coupons secured thereby they have filed or have transmitted to the said circuit court for the eastern district of Missouri, for filing, their cross-bill for the foreclosure of said general mortgage and the sale of the mortgaged property, and your orators file herewith a true copy of their said cross-bill and pray that your honors will take the same as part of this ancillary cross-bill, your orators making all the averments and showing unto your honors the same facts which are set forth in the cross-bill filed as aforesaid.

Your orators further show that all the statements contained in said cross-bill are true, as they are informed and believe, and they repeat the same herein, and your orators make the same persons defendants in this cause that are named in said cross-bill filed as aforesaid and pray process against the said defendants as in said cross-bill they have already prayed.

And your orators pray that your honors will make such orders and decrees, preliminary and final, as are prayed for in said cross-bill so filed by your orators in the circuit court of the United States for the eastern district of Missouri, and that your honors will also make all such other necessary orders, judgments, and decrees as may be required in aid of the said cross-bill; that your honors will take ancillary jurisdiction with the said circuit court for the eastern district of Missouri and will give your orators all the relief which may be necessary in accomplishing the purposes of filing said cross-bill.

36 And your orators pray such other and further relief as the nature of the case may require and to your honors seem meet.

CENTRAL TRUST CO. OF N. Y.
BUTLER, STILLMAN & HUBBARD,
Solicitors for Complainants in Cross-bill.

WM. ALLEN BUTLER,
T. E. STILLMAN,
T. H. HUBBARD,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, State of New York, City and County of New York, } ss:

Frederick P. Olcott, being duly sworn, says that he is the president of The Central Trust Company of New York, one of the complainants in the above bill; that the said bill is true of his own knowledge except as to those matters therein stated to be on information and belief, and as to those matter- he believes it to be true.

F. P. OLCOTT.

Sworn to before me this 10 day of June, 1884.

C. S. SIMPSON,
[SEAL.] *Notary Public, N. Y. Co.*

37 In the Circuit Court of the United States for the Eastern District of Missouri.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri, sitting in equity:

Humbly complaining, show unto your honors your orators, The Central Trust Company of New York and James Cheney, that your orator The Central Trust Company of New York is a corporation created by and existing under the laws of the State of New York, having its principal office for the transaction of business in the city of New York, in said State of New York, and that your orator James Cheney is a citizen and resident of the State of Indiana.

That on and prior to the 1st day of June, 1880, there existed a railroad corporation known as the Wabash, Saint Louis and Pacific Railway Company, which was created a body corporate by and existing under the laws of the States of Missouri, Illinois, Indiana, and Ohio; that said consolidated corporation then owned and operated a number of lines of railway extending across the said States of Missouri, Illinois, and Indiana, and also into the States of Ohio, Michigan, and Iowa, with branches extending in various directions within said States, and then had and still has its principal office and place of transacting business in the city of St. Louis, in the State of Missouri, in said eastern district of Missouri.

And your orators further show unto your honors that heretofore, to wit, on or about said 1st day of June, 1880, the said Wabash, St. Louis and Pacific Railway Company, by its president and
38 secretary and under its corporate seal, made and executed its fifty thousand bonds, numbered consecutively from one to fifty thousand, inclusive, each for the sum of one thousand dollars, bearing date on said 1st day of June, 1880, and by the terms of each of said bonds the said last-mentioned railway company promised to pay to your orators or bearer the sum of $1,000 in United States gold coin of the then standard of value at its office or agency in the city of New York on the 1st day of June, 1920, together with interest thereon at the rate of six per cent. per annum, payable

in like gold coin on the first days of June and December in each year on the presentation and surrender of coupons annexed to said bonds as they should severally become due; that the said bonds were so made and executed in pursuance of a resolution to that end duly adopted by the board of directors of said railroad corporation and of a resolution duly adopted by the concurrence of the holders of more than two-thirds in amount of the stock of such corporation at a meeting duly called and held at the office of said railroad company in St. Louis, Missouri, on the 5th day of May, 1880, which said last-mentioned resolution is recited in the indenture of mortgage delivered to your orators, as hereinafter set forth; that subsequent to the said 1st day of June, 1880, the said railroad corporation issued and delivered and sold or caused to be issued, delivered, and sold 17,000 of said bonds, with the coupons attached and duly certified by your orators as trustees, according to the terms and conditions of said mortgage, and said bonds are now outstanding in the hands of divers persons as owners and holders thereof whose names are unknown to your orators.

That on or about said 1st day of June, 1880, the said
39 Wabash, St. Louis and Pacific Railway Company, being the owner of or having an interest, by way of lease or otherwise, in and being in possession of the lines of railway and property hereinafter described, did, in order to secure the payment of the principal and interest of said issue of fifty thousand bonds as the same should mature and in pursuance of the further provisions of said several resolutions, make, execute, and deliver to your orators a certain deed or indenture of trust and mortgage known as its "general mortgage," whereby it conveyed to your orators as trustees and to their heirs and successors in said trust all the right of way and railroad and other property of the said Wabash, St. Louis and Pacific Railway Company particularly described in said mortgage, and also all the right, title, and interest of said railway company as the same then existed or might thereafter exist by virtue of any contract, lease, purchase, or consolidation in and to certain railroads described in said general mortgage and then in process of amalgamation with the railroad of said Wabash, St. Louis and Pacific Railway Company, all of which railways and property embraced in and covered by said general mortgage are particularly set forth in said general mortgage, a true and correct copy whereof is annexed to the bill of complaint hereinafter referred to, marked Exhibit B, and your orators pray that the same may be taken as a part of this bill as fully as if incorporated into the body of it, and your orators refer to the said copy as showing the property embraced in and covered by said general mortgage and the terms, conditions, and provisions thereof.

That said general mortgage was duly executed, acknowledged, and recorded as required by law; and your orators further
40 show unto your honors that certain portions of railroad owned by said railroad company were at the time of the execution and delivery of said general mortgage incumbered by one or more mortgages or deeds of trusts made, executed, and delivered by the re-

spective corporations which owned said lines or portions of said railroad prior to the time of the acquisition thereof by said Wabash, St. Louis, and Pacific Railway Company and intended to secure payment of the bonded indebtedness of such corporations, and that the said general mortgage was by the terms thereof expressly made subject and inferior to all such prior liens as were charged upon the several portions of said road and the equipment thereof and to the estate and liens of such specific trusts and mortgages and other obligations as might thereafter be made and charged by said railroad company upon specific property which said Wabash, St. Louis and Pacific Railway Company might thereafter acquire, and which trusts so charged should form part of the purchase-money or condition of the acquisition of such after-acquired property so charged by said last-mentioned railway company.

That the said mortgages or deeds of trust, which at the time of the delivery of said general mortgage were liens upon portions of the railway and equipment conveyed thereby, are very numerous and are substantially as follows:

Mortgages on Lines Owned by said Mortgagor.

1. Mortgage made by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company of New York, trustee, dated September, 1853, to secure $900,000 of bonds due (as extended) August 1, 1890, and interest at 7 per cent., covering line from To-
ledo, Ohio, to the westerly boundary of Ohio, about 75½
41 miles.

2. Mortgage made by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company of New York, trustee, dated August, 1853, to secure $2,500,000 of bonds due (as extended) August 1, 1890, and interest at 7 per cent., covering line from the westerly boundary of Ohio to the easterly boundary of Illinois, about 166$_{10}^{1}$ miles.

3. Mortgage made by Great Western Railroad Company of 1859 to the Farmers' Loan and Trust Company of New York, trustee, dated May, 1863, to secure $2,500,000 of bonds, whereof $2,496,000 are outstanding, due August 1, 1888, and interest at 7 per cent., covering line from Naples and Meredosia, Illinois, to the boundary line between Illinois and Indiana, about 180$_{10}^{7}$ miles.

4. Mortgage made by the Illinois and Southern Iowa Railroad Company to James R. Jessup, —— Griswold, and —— Tilton, trustees, dated March, 1862, to secure $300,000 of bonds due (as extended) August 1, 1912, and interest at 6 per cent., covering line from Clayton to Carthage, Illinois, about 29$_{10}^{1}$ miles.

5. Mortgage made by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, trustee, dated June, 1869, to secure $2,700,000 of bonds due August 1, 1889, and interest at 7 per cent., covering line from Decatur to East St. Louis, Illinois, about 108½ miles.

6. Mortgage made by the Quincy and Toledo Railroad
42 Company to John T. Terry, trustee, dated May, 1865, to se-

cure $500,000 of bonds due November 1, 1890, and interest at 7 per cent., covering line from the west bank of the Illinois river opposite Meredosia to Clayton, Illinois, about $33\frac{6}{10}$ miles.

7. Second mortgage made by the Toledo and Wabash Railroad Company to Edwin D. Morgan, trustee, dated September, 1853, to secure $1,000,000 of bonds due (as extended) November 1, 1893, and interest at 7 per cent., covering line from Toledo, Ohio, to the westerly boundary of Ohio, about $75\frac{1}{2}$ miles.

8. Second mortgage made by the Wabash and Western Railway Company to Edwin D. Morgan, trustee, dated October, 1858, to secure $1,500,000 of bonds due (as extended) November 1, 1893, and interest at 7 per cent., covering line from the westerly boundary of Ohio to the easterly boundary of Illinois, about $166\frac{1}{10}$ miles.

9. Second mortgage made by the Great Western Railroad Company of 1859 to Solon Humphreys and James R. Jessup, trustees, dated May, 1865, to secure $2,500,000 of bonds due May 1, 1893, and interest at 7 per cent., covering line from Naples to Meredosia, Illinois, to the boundary line between Illinois and Indiana, about $180\frac{7}{10}$ miles.

10. Mortgage made by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup, trustees, dated February 1, 1867, to secure $2,610,000 consolidated bonds due February 1, 1907, and interest at 7 per cent., covering the whole line owned by said company on February 1, 1867, being the lines above mentioned except the lines from Decatur to East St. Louis and subject to several mortgages aforesaid, except as to line from
43 Carthage to Elvaston, Illinois, about 9 miles, on which it is a first lien, in all about 491 miles.

11. Mortgage made by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, trustees, dated May 17, 1879, to secure $2,000,000 of bonds due April 1, 1909, and interest at 7 per cent., covering the lines owned by said company May 17, 1879, subject to the mortgages above described, in all about $599\frac{1}{2}$ miles.

12. Mortgage made by the Wabash Railway Company to Alfred T. White, trustee, dated May, 1879, to secure $500,000 of bonds due June 1, 1909, and interest at 7 per cent., covering line from Naples, Illinois, to the Mississippi river at East Hannibal, about $50\frac{7}{10}$ miles.

13. Mortgage made by the North Missouri Railroad Company to Edwin D. Morgan and Louis A. Meyer, trustees, dated March, 1865, to secure $6,000,000 of bonds due March 9, 1895, and interest at 7 per cent., covering line from St. Louis to Coatesville and from Moberly to North Missouri Junction, Missouri, about $354\frac{1}{10}$ miles.

14. Mortgage made by the St. Louis, Kansas City and Northern Railway Company to the Farmers' Loan and Trust Company of New York, trustee, dated September, 1874, to secure $3,000,000 of bonds known as real-estate and railway mortgage bonds, due September 1, 1895, and interest at 7 per cent., constituting first mortgage on real estate and railway in St. Louis, Moberly, &c., and second mortgage on line from St. Louis to Coatesville and Moberly to North Missouri Junction.

15. Mortgage made by the St. Louis and Kansas City and Northern Railway Company to H. F. Vail and Charles Parsons,
44 trustees, dated October, 1878, to secure $1,000,000 of bonds known as St. Charles Bridge first-mortgage bonds, due October 1, 1908, and interest at 6 per cent., covering the St. Charles bridge.

16. Second mortgage made by the St. Louis, Kansas City and Northern Railway Company to Solon Humphreys and G. E. Leighton, trustees, to secure $388,500 of bonds known as St. Charles Bridge second-mortgage bonds, due October 1, 1903, and interest at 7 per cent., covering the St. Charles bridge.

17. Mortgage made by the St. Louis, Kansas City and Northern Railway Company to the United States Trust Company of New York, trustee, dated Feb-uary, 1879, to secure $2,350,000 of bonds due April, 1819, and interest at 7 per cent., covering line from Elm Flats, Missouri, to Council Bluffs, about 43½ miles.

18. Mortgage made by the St. Louis, Kansas City and Northern Railway Company to George I. Seney, trustee, dated July, 1879, to secure $264,000 of bonds due July, 1919, and interest at 6 per cent., covering branch from Roseberry, Missouri, to Clarinda, Iowa.

Mortgages on Leased Lines.

1. Mortgage made by the Toledo, Peoria and Western Railroad Company to P. H. Brown, R. C. Martin, and John Paton, trustees, dated May 22, 1880, to secure $4,500,000 of bonds due May, 1907, and interest at 7 per cent., covering lines from Warsaw, Illinois, to the State line of Indiana, and from La Harpe, Illinois, to Burlington, Iowa.

2. Mortgage made by the Toledo, Peoria and Western Railroad Company to J. P. Giraud Foster, George J. Gould, and Archi-
45 bald Hopkins, trustees, to secure $2,000,000 first-preferred income bonds and interest at 4 per cent., covering the line last above mentioned.

3. Mortgage made by the Boone County and Booneville Railroad Company to John M. Woodson and R. A. Betts, trustees, dated May 1, 1873, to secure $100,000 of bonds due May, 1903, and interest at 7 per cent., covering line between Centralia and Columbia, Missouri.

4. Mortgage made by the St. Louis, Ottumwa and Cedar Rapids Railroad Company to Solon Humphreys and George S. Coe, trustees, dated October 1, 1875, to secure $322,500 of bonds due October, 1897, and interest at 7 per cent., covering line from Moberly, Missouri, to Ottumwa, Iowa.

5. Mortgage made by the Brunswick and Chillicothe Railroad Company to George M. Rice, J. Kimball, and E. P. Burnham, trustees, dated August 1, 1878, to secure $304,500 of bonds due August, 1903, and interest at 6 per cent., covering line from Brunswick to Chillicothe.

6. Mortgage made by the St. Louis, Council Bluffs and Omaha Railroad Company to James B. Eads and J. A. Jamison, trustees, dated July 1, 1878, to secure $626,000 of bonds due July, 1908, and

interest at 6 per cent., covering line from Chillicothe to Elm Flats, Missouri.

7. Mortgage made by the Quincy, Missouri and Pacific Railroad Company to Solon Humphreys and Orville H. Browning, trustees, dated October 1, 1879, to secure $1,204,000 of bonds due October, 1909, and interest at 6 per cent., covering line from West Quincy, Missouri, to the Missouri river opposite Brownsville, Nebraska.

46 Your orators show further that after the date of the said general mortgage the said The Wabash, St. Louis and Pacific Railway Company made, executed, and delivered certain mortgages upon specific property acquired by it and forming part of the purchase-money or condition of the acquisition of the property so charged as follows:

1. Mortgage to Henry F. Spaulding and John T. Terry, trustees, dated July 1, 1880, to secure $4,500,000 of bonds due July 1, 1900, and interest at 5 per cent., covering Chicago and Paducah railway from Effingham to Streator, Illinois, with branch from Effingham to Altamont, and Chicago and Strawn railway from Strawn to Chicago, Illinois, known as the Chicago division.

2. Mortgage to Henry F. Spaulding and John T. Terry, trustees, dated December 1, 1880, to secure $1,600,000 of bonds, whereof $1,210,000 are outstanding, due December 1, 1910, and interest at 6 per cent., covering the Champaign, Havana and Western railway from Champaign to White Heath, Illinois, and thence to Havana, Illinois, with a branch from White Heath to Decatur, known as the Havana division, the said line being subject to a certain other mortgage made by the Champaign, Havana and Western Railway Company to Henry W. Ford and Richard S. Brock, trustees, dated July 1, 1879, to secure $1,450,000 of bonds due July 1, 1909, and interest at 7 per cent., of which last-mentioned bonds $340,900 are outstanding.

3. Mortgages to the Mercantile Trust Company of New York and James Cheney, trustees, dated respectively July 1, 1881, and November 3, 1881, to secure bonds, whereof about $2,251,000

47 have been issued, due July 1, 1911, with interest at 6 per per cent., covering the Detroit, Butler and St. Louis railway from Detroit, Michigan, to Butler, Indiana, and property known as the Detroit division.

4. Mortgage to the Mercantile Trust Company of New York, trustee, dated October 1, 1881, to secure $3,857,000 of bonds due October 1, 1931, with interest at 5 per cent., covering line from Danville to St. Francisville, Illinois, and from Vincennes, Indiana, to Cairo, Illinois, known as the Cairo division.

Your orators further show that after the date of said general mortgage the said The Wabash, St. Louis and Pacific Railway Company acquired rights and interests in certain other railway lines, and pursuant to divers contracts or agreements issued certain of its bonds secured by said general mortgage for the purpose of building or extending certain specific lines of railway, and that the several railway corporations to whom said bonds were so delivered made, executed, and delivered to your orators certain mortgages or deeds

of trust covering their respective lines of railway as further security for the payment of the bonds so delivered, and that said mortgages are as follows:

Sustaining Mortgages.

1. Mortgage made by the Des Moines Northwestern Railway Company, dated February 28, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $7,000 per mile of completed road, covering line from Panora to Waukee and proposed extensions from Panora to Sioux City and Spirit Lake and from Waukee to Des Moines.

48 2. Mortgage made by the Champaign and Southeastern Railway Company, dated March 1, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $15,000 per mile of road, covering line from Champaign to Sidney, Illinois.

3. Mortgage made by the St. Louis, Jerseyville, and Springfield Railroad Company, dated November 4, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $15,000 per mile of road, covering line from a point at or near New Berlin to a point at or near Grafton or Jersey Landing, Illinois.

4. Mortgage made by the Des Moines and St. Louis Railroad Company, dated December 1, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $15,000 per mile of road, covering line from Des Moines to Albia, Iowa.

5. Mortgage made by the Attica, Covington and Southern Railway Company, dated February 17, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $10,000 per mile of road, covering line from Attica to Covington, Indiana, about $14\frac{5}{10}$ miles.

That all of said five last-mentioned mortgages were duly recorded, as required by law, and your orator respectfully prays leave to produce and refer to the several and respective originals of said last-mentioned mortgages when the same shall be produced upon the hearing of this cause.

Your orators further show that after the date of said general mortgage the said Wabash, St. Louis and Pacific Railway

49 Company acquired by purchase or lease or contract in the nature of lease divers other lines of railway and other property, and the said lines of railway *and*, so far as your orators have been able to ascertain, are as follows:

1. The Indianapolis, Peru and Chicago railway, covering line from Indianapolis to Peru, and the Michigan City and Indianapolis railway, from Michigan City to La Porte, leased to the said Wabash, St. Louis and Pacific Railway Company, which executed and delivered bonds to the amount of $2,275,000, due June 1, 1921, bearing interest at 6 per cent., to pay for the same, secured by mortgage made by the Indianapolis, Peru and Chicago Railway Company to Abram W. Hendricks and Wager Wayne, trustees, dated June 1, 1881, covering its line of railway, and by mortgage made by the Michigan City and Indianapolis Railroad Company of same date to the same

trustees, covering the line of said last-mentioned company, $275,000 of said bonds being made for the purpose of taking up a like amount of bonds due July 1, 1891, and interest at 7 per cent., secured by a prior mortgage made by said Indianapolis, Peru and Chicago Railway Company to Clifford A. Hand, trustee, dated July 1, 1871, the said line of the Indianapolis, Peru and Chicago Railway Company being also subject to a mortgage made by the Chicago, Cincinnati and Louisville Railroad Company to George T. M. Davis, trustee, dated January 1, 1867, to secure $1,000,000 of bonds due January 1, 1887, and interest at 7 per cent.

2. The Missouri, Iowa and Nebraska railway, covering line from Keokuk, Iowa, to Van Wert, Iowa, leased to the said Wabash, St. Louis and Pacific Railway Company, which executed and
50 delivered bonds to the amount of $2,269,000, due March, 1921, with interest at 6 per cent. per annum, to pay for the same, secured by mortgage made by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company, trustee, dated March 1, 1881, covering the line last aforesaid.

3. The Centerville, Moravia and Albia railroad, from Centerville to Albia, Iowa, about twenty-four miles, leased to the Wabash, St. Louis and Pacific Railroad Company, subject to mortgage to the Farmers' Loan and Trust Company of New York, trustee, to secure $400,000 of bonds due in 1920 and interest at 6 per cent.

4. The Havana, Rantoul and Eastern railway, from West Lebanon, Indiana, to Le Roy, Illinois, about seventy-six miles, subject to a mortgage to Thomas B. Coulter, trustee, dated July, 1879, to secure $300,000 of bonds due July, 1897, and interest at 7 per cent.

5. The Springfield and Northwestern railway, covering line from Springfield to Havana, Illinois, about $46\frac{2}{10}$ miles.

6. The Peoria, Pekin and Jacksonville railway, from Hollis to Jacksonville, Illinois, about $75\frac{3}{10}$ miles, and portion from Hollis to Peoria, Illinois, $7\frac{7}{10}$ miles, leased by the Toledo, Peoria and Western Railroad Company and included in the lease to the Wabash, St. Louis and Pacific Railway Company.

7. Branch railroad from the Chicago division to the Braidwood coal-fields, about 12 miles.

8. The Humeston and Shenandoah railroad, from Humeston, Iowa, to Shenandoah, Iowa, about 113 miles, leased to the
51 Chicago, Burlington and Quincy Railroad Company and the Wabash, St. Louis and Pacific Railway Company.

9. Fourteen lots of land in Burlington, Iowa, subject to mortgage to J. P. Giraud Foster, trustee, dated September, 1880, to secure notes, whereof $70,000 remain unpaid.

And your orators further show that said Wabash, St. Louis and Pacific Railway Company has acquired a large amount of valuable property in addition to that hereinbefore set forth which is subject to the lien of said general mortgage and which your orators are unable to describe with particularity.

Your orators further show that on or about the 10th day of April, 1883, the said Wabash, St. Louis and Pacific Railway Company executed and delivered to the St. Louis, Iron Mountain and South-

ern Railway Company, a corporation created by and existing under the laws of the State of Missouri, an indenture of lease whereby said first-mentioned corporation leased to said last-mentioned corporation all its lines of railroad, whether owned or leased, upon the terms and conditions therein stated and set forth, a copy of which indenture of lease, marked Exhibit C, is filed with the bill of complaint, hereinafter referred to, and your orators pray leave to refer to the same as if it were herein fully and at large set forth; that the said lessee company, after the making of said lease, operated the said lines of railroad and continued so to do until the appointment of the receivers hereinafter mentioned.

Your orators further show that thereafter, to wit, on or about the 1st day of May, 1883, the said The Wabash, St. Louis and Pacific Railway Company, being the owner and in possession of or
52 having valuable rights and interests in certain bonds, shares of stock, steamers, rolling stock, and real property, made, executed, and delivered to the Mercantile Trust Company of New York, as trustee, an indenture of trust for the purpose of securing a number of bonds of said railway company, known as collateral trust bonds, amounting to $10,000,000, dated May 1, 1883, payable in twenty years from the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of May and November of each year; that a copy of said last-mentioned indenture is filed with the bill of complaint, hereinafter referred to, marked Exhibit D, and your orator- pray leave to refer to the same as if it were herein fully and at large set forth; that the said St. Louis, Iron Mountain and Southern Railway Company united in the execution of said indenture and guaranteed the payment of the principal and interest of said collateral trust bonds. Your orators further show that, as they are informed and believe, as to a large part, if not all, of the property mentioned in said indenture of trust, the said general mortgage is a lien prior and superior to the alleged lien of said collateral trust mortgage.

Your orators further show that on or about the 21st day of December, 1883, the Wabash, St. Louis and Pacific Railway Company made, executed, and delivered to the St. Louis, Iron Mountain and Southern Railway Company a deed or indenture conveying to said last-mentioned company all its lines of railway and all its property, choses in action, incomes, rents, and profits, by way of mortgage, to secure payment of the principal and interest of said collateral trust bonds, to indemnify the said mortgagee in respect to its guar-
53 anty of said collateral trust bonds, and to secure payment to said mortgagee of all other money paid by said Iron Mountain Company for the benefit of or lent or advanced to said mortgagor and all debts to said Iron Mountain Company from said mortgagor; that said last-mentioned indenture has been recorded, but is in all respects subject and subordinate to the said general mortgage; that a copy thereof, marked Exhibit E, is filed with the bill, hereinafter mentioned, and your orator- prays leave to refer to the same as if the same were made a part of this bill.

Your orators further show that on the 2d day of June, 1884 (the

first day of June, 1884, being Sunday), there became due and payable and accruing upon the bonds secured by said general mortgage a semi-annual installment of the interest evidenced by the coupons attached to said bonds due on said last-mentioned day; that default was made in the payment of the interest on said bonds and of the said installment of interest accruing on said bonds, as aforesaid; that the said The Wabash, St. Louis and Pacific Railroad Company wholly failed, omitted, and refused to pay the said installment of interest and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day or any of them, but therein wholly made default; that a large number of said coupons representing said installment of interest due and payable on said 2d day of June, 1884, were on said last-mentioned day or shortly thereafter actually presented for payment at the place where the same were and are payable, to wit, at the office or agency of the Wabash, St. Louis and Pacific Railway Company in the city of New York, and payment thereof was demanded and re-
54 fused; that prior to June 1, 1884, the said Wabash, St. Louis and Pacific Railway Company or the officers thereof or some of them gave public notice, by circular and otherwise, that the said railway company would not pay the interest accruing on its said general mortgage bonds and other obligations on the 1st of June, 1884, and that by reason of the matters aforesaid default has been made by the said Wabash, St. Louis and Pacific Railway Company in the performance of the terms and provisions of said general mortgage, and the conditions of said general mortgage have become and are broken and the said several conveyances to your orators, as trustees as aforesaid, have become and are absolute.

Your orators further show upon information and belief that Griswold and Tilton, the cotrustees with James R. Jessup under the said mortgage made by the Illinois and Southern Iowa Railroad Company, dated March, 1862; Edwin D. Morgan, the sole trustee under the said second mortgage made by the Toledo and Wabash Railroad Company, dated September, 1853, and the said second mortgage made by the Wabash and Western Railroad Company, dated October, 1858, and cotrustee with Louis H. Meyer under said mortgage made by the North Missouri Railroad Company, dated March, 1865; Orville H. Browning, cotrustee of Solon Humphreys under the said mortgage made by the Quincy, Missouri and Pacific Railroad Company, dated October 1, 1879, and H. F. Vail, cotrustee with Charles Parsons under said mortgage made by the St. Louis, Kansas City, and Northern Railway Company, dated October, 1878, have departed this life.

And your orators further show that, as they are informed and believe, the said Wabash, St. Louis and Pacific Railway Com-
55 pany did after execution, delivery, and recording of said general mortgage from time to time make and issue its promissory notes for very large sums of money and procured the same to be endorsed by Solon Humphreys and divers other persons whose names are unknown to your orators; that the said railway company sold said notes to the Equitable Life Assurance Company of New

York and pledged with the endorsers thereof certain of the said collateral trust bonds by way of security for the payment of the same.

And your orators further show unto your honors that they intended and proposed to bring their bill of complaint in this honorable court for the foreclosure of the said general mortgage and to protect the rights and interests of the holders of the bonds and coupons secured thereby by a sale of the said mortgaged property so soon as default should be made in the performance of the terms and conditions of said general mortgage, but now so it is, may it please your honors, that the said The Wabash, St. Louis and Pacific Railroad Company, combining and confederating with Solon Humphreys and divers other persons at present unknown to your orators, whose names when discovered your orators pray they may be at liberty to insert herein and afterwards to charge them as parties defendant hereto, has lately and before the first day of June, 1884, filed its bill in this honorable court against your orators and the several persons who are named as trustees in the several mortgages aforesaid or some of them and certain of the railway corporations aforesaid, praying, among other things, that this court take cognizance of said bill and appoint one or more receivers of the said railway and property and direct such receivers to take possession of and
56 operate the same; that the court, under said bill or under such cross-bills as the parties in interest may also file, decree the sale of said entire property and cause all the liens upon the same or any part thereof and all rights, claims, and equities of all persons interested therein to be ascertained, and that the proceeds arising from the sale of such property or any part thereof be applied under the orders and decrees of this court according to the rights, interests, and equities of parties or persons interested in said fund.

That in and by the said bill the said railway company avers and states and your orators also upon information and belief aver that said railway company is for the time being practically insolvent and unable to pay its floating debt or the interest accruing on the bonds and other obligations for the payment whereof it is liable, and said railway company pretends that the notes aforesaid upon which it alleges there will be due at maturity about the sum of $2,200,000 were issued and applied to provide means for the meeting of its expenses and the keeping of its road in successful operation and completing its line, as well as to pay interest accruing on bonds secured by mortgages prior and superior to those secured by said general mortgage and also maturing installments of the purchase-money of rolling stock necessary and indispensable to the use of the said road, and therefore the said railway company prays that this court shall make preliminary orders or decrees to enable the receiver or receivers appointed under said bill to protect the endorsers upon said notes and prevent the foreclosure of the collateral trust aforesaid; that your orators are not informed, save by
57 said bill, whether or not the said notes or any of them were in fact issued or applied for the purposes aforesaid or any of them, and they therefore deny the several allegations in that behalf

contained in said bill, and they insist that said notes are not equitably entitled to be paid, protected, or provided for in preference to the said general mortgage bonds and coupons. Your orators further show that such proceedings have been had under said last-mentioned bill that Solon Humphreys and Thomas E. Tutt have by the order of this honorable court been appointed receivers as prayed in and by said bill and have qualified as such, and that they have been also appointed receivers by orders of the circuit court of the United States for the other districts wherein said lines of railway are situate under ancillary bills filed by said railway company in aid of the said bill so as aforesaid filed in this honorable court; that an order has been made by this court directing the said receivers to protect by their obligations the said promissory notes as they severally mature, and your orators are apprehensive that the said lines of railway and property embraced in and covered by said general mortgage may be subjected to the payment of said notes and such general debts of said railway corporation in preference to the said general mortgage bonds and coupons, all of which is contrary to equity and good conscience and to the manifest wrong and injury of your orators and of the owners and holders of the bonds and coupons which they represent.

Your orators further show that unless the said lines of railway shall be operated, managed, or controlled by a receiver or receivers appointed by the court there will be a multiplicity of suits and judgments against said railway company, which will obstruct
58 the operation of said railways and cause great loss to the holders of the bonds aforesaid and a sacrifice of the property of the said railway company.

Your orators further show that no proceedings at law have been had nor any suit or action commenced by or on behalf of your orators or of any holders of said general mortgage bonds, so far as your orators have any knowledge, for any interest unpaid or accrued thereon.

Your orators further show that the following-named persons have or claim to have interests in said mortgaged property as lessors, mortgagors, or trustees under deeds of trust, and your orators make them defendants herein:

The St. Louis, Iron Mountain and Southern Railway Company, which is a citizen and resident of the State of Missouri as aforesaid.

The Mercantile Trust Company of New York, The Farmers' Loan and Trust Company of New York, and The United States Trust Company of New York, each a corporation created by and existing under the laws of the State of New York and a citizen and resident of said State.

James R. Jessup, John T. Terry, Daniel A. Lindley, Alfred T. White, Henry F. Spaulding, Wager Swayne, Louis H. Meyer, J. P. Giraud Foster, Clifford A. Hand, Robert C. Martin, George J. Gould, George S. Coe, George T. M. Davis, George I. Seney, and John Paton, all of whom are residents and citizens of the State of New York; Solon Humphreys and Henry W. Ford, residents and citi-

zens of the State of New Jersey; Archibald Hopkins, a resi-
59 dent and citizen of the city of Washington and District of Columbia; John M. Woodson, James B. Eads, and Charles Parsons, all of whom are citizens and residents of the State of Missouri; Abraham M. Henricks, who is a citizen and resident of the State of Indiana; R. S. Brock, G. E. Leighton, Thomas B. Coulter, P. H. Brown, R. A. Betts, George M. Rice, J. Kimball, E. P. Burnham, J. A. Jamison, and Isaac H. Knox, of whose residence your orators are not informed; The Eel River Railroad Company, a corporation of the State of Indiana and a citizen and resident of said State; The Toledo, Peoria and Western Railroad Company, a corporation of the State of Illinois and a citizen and resident of that State; The Boone County and Booneville Railroad Company, St. Louis, Ottumwa and Cedar Rapids Railroad Company, The St. Joseph and St. Louis Railroad Company, The Brunswick and Chillicothe Railroad Company, St. Louis, Council Bluffs and Omaha Railroad Company and St. Louis, Kansas City and Northern Railway Company, and The St. Louis Bridge Company, all corporations of the State of Missouri and citizens and residents of said State; Des Moines and St. Louis Railroad and Des Moines and Northwestern Railroad Company, corporations of the State of Iowa and residents and citizens of said State; St. Louis, Jerseyville and Springfield Railroad Company and The Champaign and Southeastern Railroad Company, corporations of the State of Illinois and residents and citizens of that State; The Attica, Covington and Southern Railway Company, a corporation of the State of Indiana and a resident and citizen of that State.

Wherefore, and forasmuch as your orators are remediless
60 in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this nature are properly recognizable and reviewable, to the end, therefore, that the said defendants may be required to make answer respectively to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were here expressed and they thereunto particularly interrogated, but not under oath, answers under oath being hereby expressly waived; that an account be had and taken of the bonds and coupons secured by said general mortgage and of the amount due thereon; that the names of the lawful holders thereof may be ascertained; that an account be taken of the general mortgage bonds which are also secured by the several mortgages made to your orators and hereinbefore styled "sustaining mortgages;" that an account be also taken of all the property of the said Wabash, St. Louis and Pacific Railway Company, whether acquired before or after the execution of said general mortgage, and that an account be also taken of all the liens and encumbrances upon the same or any part thereof and the priorities thereof determined; that the said general mortgage may be decreed to be a first lien upon all the railroads and other property described therein, subject only to such liens as are therein and thereby recited and declared to be liens prior thereto; that this court may appoint successors to any deceased trustees as may be

necessary for the proper execution of their several trusts, or may make such other order as may be required in order that said trusts may be properly represented in this suit; that the several defendants may be required to state and set up their respective interests in said property; that the said property may be sold
61 at a judicial sale thereof free from the claims of all parties hereto and from the claims of all persons whose interests are in any manner represented by any party hereto under the judgment or decree of this honorable court and upon such terms and conditions as to the court shall seem meet and proper; that each and all of said defendants and all persons in like situation with them or any of them and all persons claiming or to claim by, from, or under them or any of them may from and by said sale be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to any and all of the property of said Wabash, Pacific and St. Louis Railway Company; that the said judgment or decree may contain such provisions with respect to priorities of liens and the due application of the proceeds of sale according to the rights of the parties as may be just and equitable; that if such proceeds be insufficient to pay and satisfy the amount on said general mortgage bonds and coupons the said Wabash, St. Louis and Pacific Railway Company may be adjudged to be liable and may be required to pay to your orators the amount of any deficiency which may remain; that pending this suit a receiver or receivers may be appointed, accor-ing to the course and practice of this court, with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises and the property, franchises, equitable interests, things in action, effects, moneys, receipts, bills, incomes, earnings, rights, privileges, and immunities of said company connected with or relating to said mortgaged premises and of all the rolling stock, machinery, equipment, and other property incident to the same, and that said receiver or receivers may be authorized and directed to maintain and operate said railroads and to keep the same in proper repair and to receive, collect, and
62 preserve all the property, assets, and income of said company, and that such other orders or directions may be made in respect to said receivership as may be equitable and proper; that any and all orders heretofore made whereby payment of the said promissory notes or any of them is or may be charged upon the mortgaged premises may be vacated; that an injunction may issue restraining the defendants and each of them from interfering with, transferring, selling, or disposing of any of the said property and from taking possession of, levying upon, or attempting to sell the same or any part thereof, and that your orators may have such other or further relief as the nature of the case may require and to your honors seem meet—

May it please your honors to grant unto your orators a writ of subpœna to be directed to the said defendants The Wabash, St. Louis and Pacific Railway Company and the several other defendants hereinbefore mentioned, thereby commanding them and each of them, at a certain time and under a certain penalty therein to

be named, to be and appear before your honors in this honorable court, and then and there severally to answer all and singular the matters aforesaid (but not under oath) and to stand to, abide, and perform such other or further orders and decrees therein as to your honors shall seem meet.

CENTRAL TRUST CO. OF N. Y.
JAMES CHENEY.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Complainants in Cross-bill.
WM. ALLEN BUTLER,
T. E. STILLMAN,
T. H. HUBBARD,
Of Counsel.

63 UNITED STATES OF AMERICA,
Southern District of New York, State of New York, City and County of New York, } ss:

Frederick P. Olcott, being duly sworn, says that he is the president of The Central Trust Company of New York, one of the complainants in the above bill; that the said bill is true of his own knowledge except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

F. P. OLCOTT.

Sworn to before me this 7th day of June, 1884.

C. S. SIMPSON,
[L. S.] *Notary Public, N. Y. Co.*

(Endorsed:) Filed June 13th, 1884. Wm. H. Bradley, clerk.

64 Afterward, to wit, on the twenty-eighth day of July, in the July term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

On motion of the complainant, by Green, Burnett and Humphrey, its solicitors, leave is given to file amendment to ancillary bill of complaint herein.

65 Afterward, to wit, on the twentieth day of October, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

On motion leave is hereby given the defendant Central Trust Company to file an amended cross-bill herein.

On the same day, to wit, on the twentieth day of October, 1884, came the Central Trust Company of New York and James Cheney, trustees, by their solicitors, and filed in said clerk's office their amended cross-bill in said entitled suit; which said amended cross-bill is in the words and figures following, to wit:

66 In the Circuit Court of the United States for the Northern District of Illinois.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Defendants.
} In Equity.—No. —.

Amended cross-bill of the Central Trust Company of New York and James Cheney, trustees under the general mortgage of the Wabash, St. Louis and Pacific Railway Company.

To the honorable the judges of the circuit court of the United States for the northern district of Illinois, sitting in equity:

The Central Trust Company of New York, which was at the time of filing the original bill in this suit and still is a corporation created by and existing under the laws of the State of New York, having its principal office for the transaction of business in the city of New York, in said State of New York, and James Cheney, who was at the time of filing said original bill and still is a citizen and resident of the State of Indiana, bring this their amended cross-bill of complaint, filed by leave of the court first had and obtained, against The Wabash, St. Louis and Pacific Railway Company, which was at said time and still is a consolidated corporation created by and existing under the laws of the States of Missouri,
67 Illinois, Indiana, and Ohio and having its principal office and place of transacting business in the city of St. Louis, in the State of Missouri, in the eastern district of Missouri, and a citizen and resident of said State; The St. Louis, Iron Mountain and Southern Railway Company, which then was and still is a corporation created by and existing under the laws of the State of Missouri and a citizen and resident of said State; The Mercantile Trust Company, The Farmers' Loan and Trust Company of New York, and The United States Trust Company of New York, who were at the

time of filing said original bill and still are corporations created by and existing under the laws of the State of New York and citizens and residents of the State of New York; James R. Jessup, John T. Terry, Daniel A. Lindley, Alfred T. White, Henry F. Spaulding, Wager Swayne, Louis H. Meyer, J. P. Giraud Foster, Clifford A. Hand, Robert C. Martin, George J. Gould, George S. Coe, George T. M. Davis, George I. Seney, John Paton, Alexander M. White, David J. Tyson, Jr., Henry H. Worden, John N. A. Griswold, Charles E. Whitehead, William Hill, Edward K. Goodenow, Anthony J. Thomas, Edward De Rose, Henry A. Mott, Charles Jackson, G. M. Whittemore, James H. Britton, Joseph A. Jameson, and Townsend Underhill, all of whom were at the time of filing said original bill and still are citizens and residents of the State of New York; George M. Rice, William J. Ladd, and J. C. Rogers, who were at the time of filing said original bill and still are citizens and residents of the State of Massachusetts; Solon Humphreys, Benjamin Ham, and Henry W. Ford, who were at the time of filing said original bill and still are citizens and residents of the State of New Jersey; Archibald Hopkins and James Compton, who were at the
68 time of filing said original bill and still are citizens and residents of the District of Columbia; John M. Woodson, James B. Eads, Charles Parsons, John R. Lionberger, George E. Leighton, Robert E. Betts, and Isaac H. Knox, who were at the time of filing said original bill and still are citizens and residents of the State of Missouri; Abram W. Hendricks, who was at the time of filing said original bill and still is a citizen and resident of the State of Indiana; Amos Greene, Thomas B. Coulter, and Charles H. Bull, who were at the time of filing said original bill and still are citizens and residents of the State of Illinois; Thomas Mayo, who was at the time of filing said original bill and still is a citizen and resident of the State of Connecticut; Edward P. Burnham, Henry Phelps, and Philip Henry Brown, who were at the time of filing said original bill and still are citizens and residents of the State of Maine; Richard S. Brock, who was at the time of filing said original bill and still is a citizen and resident of the State of Pennsylvania; John Kimball, who was at the time of filing said original bill and still is a citizen and resident of the State of New Hampshire; The Metropolitan National Bank, which was at the time of filing said original bill and still is a national banking association or corporation created by and existing under the laws of the United States, having its principal office and place of transacting business in the city of New York, in the State of New York, and a citizen and resident of said State of New York; The Eel River Railroad Company, The Indianapolis, Peru and Chicago Railway Company, The Michigan City and Indianapolis Railroad Company, The Chicago, Cincinnati and Louisville Railroad Company, and The Attica,
69 Covington and Southern Railroad Company, all of whom were at the time of filing said original bill corporations created by and existing under the laws of the State of Indiana and citizens and residents of said State of Indiana; The Toledo, Peoria and Western Railroad Company, The St. Louis, Jerseyville and

Springfield Railroad Company, The Champaign and Southeastern Railway Company, The Havana, Rantoul and Eastern Railroad Company, The Peoria and Pekin Union Railway Company, and The Chicago and Western Indiana Railroad Company, all of whom were at the time of filing said original bill and still are corporations created by and existing under the laws of the State of Illinois and citizens and residents of said State of Illinois; The Boone County and Booneville Railroad Company, The St. Louis, Ottumwa and Cedar Rapids Railroad Company, The St. Joseph and St. Louis Railroad Company, The Brunswick and Chillicothe Railroad Company, The St. Louis, Council Bluffs and Omaha Railroad Company, The St. Louis Bridge Company, The St. Louis, Kansas City and Northern Railway Company, The Quincy, Missouri and Pacific Railway Company, The Hannibal Bridge Company, and The Tunnel Railroad of St. Louis, all of whom were at the time of filing said original bill and still are corporations created by and existing under the laws of the State of Missouri and citizens and residents of said State of Missouri; The Des Moines and St. Louis Railroad Company, The Council Bluffs and St. Louis Railway Company, The Clarinda and St. Louis Railroad Company, The Missouri, Iowa and Nebraska Railway Company, The Humeston and Shenandoah Railroad Company, and The Des Moines and Northwestern Railroad Company, all of whom were at the time of filing said original bill and still are corporations created by and existing under the laws of the State of Iowa and citizens and residents of said State of Iowa.

And thereupon your orators complain and say that on and prior to the 1st day of June, 1880, there existed a railroad corporation known as the Wabash, St. Louis and Pacific Railway Company, which was created a body corporate by the consolidation of certain other corporations created by and existing under the laws of the States of Missouri, Illinois, Indiana, and Ohio; that said consolidated corporation then owned and operated a number of lines of railway extending across the said States of Missouri, Illinois, and Indiana and also into the States of Ohio, Michigan, and Iowa, with branches extending in various directions within said States, and then had and still has its principal office and place of transacting business in the city of St. Louis, in the State of Missouri, in said eastern district of Missouri.

And your orators further show unto your honors that heretofore, to wit, on or about said 1st day of June, 1880, the said Wabash, St. Louis and Pacific Railway Company, by its president and secretary and under its corporate seal, made and executed its fifty thousand bonds, numbered consecutively from one to fifty thousand, inclusive, each for the sum of one thousand dollars, bearing date on said 1st day of June, 1880, and by the terms of each of said bonds the said last-mentioned railway company promised to pay to your orators or bearer the sum of $1,000 in United States gold coin of the then standard of value, at its office or agency, in the city of New York, on the 1st day of June, 1920, together with interest

thereon, at the rate of six per cent. per annum, payable in
71 like gold coin on the first days of June and December in each year, on the presentation and surrender of coupons annexed to said bonds as they should severally become due; that the said bonds were so made and executed in pursuance of a resolution to that end duly adopted by the board of directors of said railroad corporation and of a resolution duly adopted by the concurrence of the holders of more than two-thirds in amount of the stock of such corporation at a meeting duly called and held at the office of said railroad company, in St. Louis, Missouri, on the 5th day of May, 1880, which said last-mentioned resolution is recited in the indenture of mortgage delivered to your orators as hereinafter set forth; that subsequent to the said 1st day of June, 1880, the said railroad corporation issued and delivered and sold or caused to be issued, delivered, and sold 17,000 of said bonds, with the coupons attached and duly certified by your orators, as trustees, according to the terms and conditions of said mortgage, and said bonds are now outstanding in the hands of divers persons, as owners and holders thereof, whose names are unknown to your orators.

That on or about said 1st day of June, 1880, the said Wabash, St. Louis and Pacific Railway Company, being the owner of or having an interest, by way of lease or otherwise, in and being in possession of the lines of railway and property hereinafter described, did, in order to secure the payment of the principal and interest of said issue of fifty thousand bonds as the same should mature and in pursuance of the further provisions of said several resolutions, make, execute, and deliver to your orators a certain deed or indenture of trust and mortgage known as its "general mortgage," whereby it conveyed to your orators, as trustees, and to their heirs and suc-
72 cessors in said trust all of the right of way and railroad of the said The Wabash, St. Louis and Pacific Railway Company, extending from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State, and also the railway of said Wabash, St. Louis and Pacific Railway Company extending from St. Louis, in the State of Missouri, in a northwesterly direction, to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in the county of Howard, in said State, and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction, to the city of Council Bluffs, in the State of Iowa, which lines of railroad will, when united, form one continuous line of railway in the same general direction from the waters of Lake Erie, at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri river as aforesaid, together with all the embankments, bridges, turnouts, side tracks,

buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad or used in connection therewith belonging to said Wabash,
St. Louis and Pacific Railway Company, together with all
73 rents, issues, and profits, credits, and choses in action accruing to said last-mentioned railway company from said railroad and appurtenances as owner and holder thereof; and the said Wabash, St. Louis and Pacific Railway Company did thereby also convey to your orators, as trustees as aforesaid, all the right, title, and interest of said last-mentioned railway company as then existing or as the same might thereafter exist by virtue of any contract, lease, purchase, or consolidation in and to certain railroads then in process of amalgamation with the railroad of said Wabash, St. Louis and Pacific Railway Company, including, with said railroads, every appurtenance thereto or things used in connection therewith, and all rents, issues, and profits arising therefrom to said Wabash, St. Louis and Pacific Railway Company, all of the above as fully as are above described with reference to the railroad then owned and held by said last-mentioned railway company, and as fully as it was or might be possible for said last-mentioned railway company to convey the same, said certain railroads being as follows: The Boone County and Booneville railway, extending from Centralia to Columbia, in the State of Missouri; the St. Louis, Ottumwa and Cedar Rapids railway, extending from Moberly, in the State of Missouri, to Ottumwa, in the State of Iowa; the St. Joseph and St. Louis railway, extending from New Lexington and Richmond and Lexington Junction to St. Joseph, in the State of Missouri; the Brunswick and Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri; the St. Louis, Council Bluffs and Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri; the Chicago and Paducah railway, extending
from Effingham and Altamont to Streator, in the State of
74 Illinois; the Chicago and Strawn railway, extending from Strawn to Chicago, in the State of Illinois; the Eel River railway, extending from Logansport to Butler, in the State of Indiana; the Quincy, Missouri and Pacific railway, extending from West Quincy, in the State of Missouri, to the Missouri river opposite Brownsville, Nebraska; the Missouri, Iowa and Nebraska railway, extending from Keokuk, Iowa, to a junction with the Omaha division of the Wabash, St. Louis and Pacific railway near the line between the State of Iowa and the State of Missouri; the Champaign, Havana and Western railway, extending from Champaign to Havana, in the State of Illinois, and from White Heath to Decatur, in the State of Illinois; the Toledo, Peoria and Western railway, extending from Warsaw, in the State of Illinois, to the State line of Indiana, and from La Harpe, in the State of Illinois, to Burlington, in the State of Iowa, and the Detroit, Butler and St. Louis railway from Butler, in the State of Indiana, to Detroit, in the State of Michigan.

And your orators further show that a true and correct copy of

the said general mortgage is annexed to and filed with the bill of complaint of the said Wabash, St. Louis and Pacific Railway Company filed in this cause and marked "Exhibit B," beginning on page 1 of the substituted printed volumes of exhibits filed with and made part of the bill of the said Wabash, St. Louis and Pacific Railway Company, complainant, and your orators pray that the same may be taken as a part of this cross-bill as fully as if incorporated into the body of it, and your orators refer to the said copy as showing the property embraced in and covered by said
75 general mortgage and the conditions, provisions, recitals, stipulations, and agreements thereof.

And your orators further show unto your honors that certain portions of the railroad owned by said railroad company were, at the time of the execution and delivery of said general mortgage, encumbered by one or more mortgages or deeds of trust made, executed, and delivered by the respective corporations which owned said lines or portions of said railroad prior to the time of the acquisition thereof by said Wabash, St. Louis and Pacific Railway Company and intended to secure payment of the bonded indebtedness of such corporations, and that the said general mortgage was by the terms thereof expressly made subject and inferior to all such prior liens as were charged upon the several portions of said road and the equipment thereof and to the estate and liens of such specific trusts and mortgages and other obligations as might thereafter be made and charged by said railroad company upon specific property which said Wabash, St. Louis and Pacific Railway Company might thereafter acquire and which trusts so charged should form part of the purchase-money or condition of the acquisition of such after-acquired property so charged by said last-mentioned railway company; that the said mortgages or deeds of trust which at the time of the delivery of said general mortgage were liens upon portions of the railway and equipment conveyed thereby are very numerous and are substantially as follows:

Mortgages on Lines Owned by said Mortgagor.

1. Mortgage made by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company of New York,
76 trustee, dated September 8th, 1853, to secure $900,000 of bonds due (as extended) August 1, 1890, and interest at 7 per cent., covering line from Toledo, Ohio, to the westerly boundary of Ohio, about 75½ miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Exhibit F," beginning at page 57 of the printed volumes of exhibits.

2. Mortgage made by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company of New York, trustee, dated August 1st, 1853, to secure $2,500,000 of bonds, due (as extended) August 1, 1890, and interest at 7 per cent., covering line from the westerly boundary of Ohio to the easterly boundary of Illinois, about 166.1 miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit,

marked "Sub-exhibit F No. 1," beginning at page 64 of the printed volumes of exhibits.

3. Second mortgage made by the Toledo and Wabash Railroad Company to Edwin D. Morgan, trustee, dated October 15, 1858, to secure $1,000,000 of bonds, due (as extended) May 1, 1893, and interest at 7 per cent., covering line from Toledo, Ohio, to the westerly boundary of Ohio, about 75½ miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 6," beginning at page 105 of the printed volumes of exhibits.

4. Second mortgage made by the Wabash and Western Railway Company to Edwin D. Morgan, trustee, dated October 15, 1858, to secure $1,500,000 of bonds, due (as extended) May 1, 1893,
77 and interest at 7 per cent., covering line from the westerly boundary of Ohio to the easterly boundary of Illinois, about 166.1 miles. A copy of said mortgage is annexed to the bill in this suit, marked "Sub-exhibit F No. 7," beginning at page 111 of the printed volumes of exhibits.

5. Mortgage made by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White, and Henry H. Worden, trustees, dated May 25, 1863, to secure $2,500,000 of bonds (whereof $2,496,000 are outstanding), due August 1, 1888, and interest at 7 per cent., covering line from Naples and Meredosia, Illinois, to the boundary line between Illinois and Indiana, about 180.7 miles. A copy of said mortgage is annexed to the amendment to the bill in this suit, marked "Sub-exhibit F No. 2," beginning at page 71 of the printed volumes of exhibits. Your orators are informed and believe that the said last-mentioned mortgage is a first lien upon the property covered thereby, the mortgages prior thereto having been in some way paid or discharged.

6. Second mortgage made by the Great Western Railroad Company of 1859 to Solon Humphreys and James R. Jessup, trustees, dated May 11, 1865, to secure $2,500,000 of bonds, due May 1, 1893, and interest at 7 per cent., covering line from Naples to Meredosia, Illinois, to the boundary line between Illinois and Indiana, about 180.7 miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 8," beginning at page 117 of the printed volumes of exhibits.

7. Mortgage made by the Illinois and Southern Iowa Rail-
78 road Company to James R. Jessup, John N. A. Griswold, and Lucien Tilton, trustees, dated March 1, 1862, to secure $300,000 of bonds, due (as extended) August 1, 1912, and interest at 6 per cent., covering line from Clayton to Carthage, Illinois, about 29.1 miles.

A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 3," beginning at page 79 of the printed volumes of exhibits.

8. Mortgage made by the Quincy and Toledo Railroad Company to John T. Terry, trustee, dated May 29, 1865, to secure $500,000 of bonds due November 1, 1890, and interest at 7 per cent., covering line from the west bank of the Illinois river, opposite Meredosia, to

Clayton, Illinois, about 33.6 miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 5," beginning at page 98 of the printed volumes of exhibits.

10. Mortgage made by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup, trustees, dated February 1, 1867, to secure $15,000,000 of bonds (whereof $2,610,000 are outstanding) due February 1, 1907, and interest at 7 per cent., covering all the lines, property, and franchises of said railroad company, namely, from Toledo, Ohio, to Meredosia and Naples, Illinois, and from Meredosia to Camp Point, Illinois, and also from Clayton, Illinois, to the east bank of the Mississippi river, at Hamilton, Illinois, and all property afterwards acquired which might be used in connection with said road, and also all property that
79 said mortgagor might thereafter acquire in the city of Quincy, Illinois, and also interest of the said mortgagor company in contract for traffic purposes with the Chicago, Burlington and Quincy Railroad Company, which said contract has long since been abandoned by the parties thereto. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 9," beginning at page 126 of the printed volumes of exhibits.

11. Mortgage made by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, trustee, dated June 3, 1869, to secure $2,700,000 of bonds due August 1, 1889, and interest at 7 per cent., covering line from Decatur to East St. Louis, Illinois, about 108½ miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 4," beginning at page 91 of the printed volumes of exhibits.

12. Mortgage made by the Wabash Railway Company to Alexander M. White, trustee, dated October 17, 1878, to receive payment of the purchase-money of certain equipment, engines, and cars therein described, amounting to $560,000, whereon $112,000 of principal, with $4,480 interest, being the last installment, became due July 1, 1884. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 85," beginning at page 956 of the printed volumes of exhibits.

13. Mortgage made by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, trustees, dated May 17, 1879, to secure $2,000,000 of bonds, due April 1, 1909, and interest at 7 per cent., covering the lines owned by said company May 17,
80 1879, subject to the mortgages above described, in all about 599½ miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 10," beginning at page 144 of the printed volumes of exhibits.

13. Mortgage made by the Wabash Railway Company to Alfred T. White, trustee, dated May 16, 1879, to secure $500,000 of bonds due June 1, 1909, and interest at 7 per cent., covering line from Naples, Illinois, to the Mississippi river at East Hannibal, about 50.7 miles. A copy of said mortgage is annexed to and filed with

the amendment to the bill of complaint in this suit, marked "Sub-exhibit F No 11," beginning at page 158 of the printed volumes of exhibits.

14. Mortgage made by the North Missouri Railroad Company to Edwin D. Morgan and Louis H. Meyer, trustees, dated March 9, 1865, to secure $6,000,000 of bonds due March 9, 1895, with interest at 7 per cent., covering the main line of railroad of said company then constructed from St. Louis, Missouri, to Macon City, Missouri, together with all the franchises, rolling stock, property, and appurtenances of said road, and also all extensions of the main line of said road northwardly from Macon City to the Iowa State line, as the same then was or might thereafter be constructed, with all properties, rights, and franchises thereto appertaining, and also the west branch of said North Missouri road, extending from Moberly, Missouri, by way of Brunswick and Richmond, to some point on the Missouri river at or below St. Joseph, Missouri, as the same then was or might thereafter be constructed, together with all the
81 properties, rights, and franchises then owned or thereafter to be acquired by said company; also all the right, title, and interest of the North Missouri Railroad Company in the stock of the St. Charles Bridge Company or in the St. Charles bridge, the entire line of railroad covered by said mortgage being about 354.1 miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this writ, marked "Sub-exhibit F No. 12," beginning at page 168 of the printed volumes of exhibits.

15. Mortgage made by the St. Louis, Kansas City and Northern Railway Company to the Farmers' Loan and Trust Company of New York, trustee, dated August 12, 1874, to secure $3,000,000 of bonds, known as real estate and railway mortgage bonds, due September 1, 1895, and interest at 7 per cent., upon the line of the railway of said company and every part thereof in the State of Missouri, being 353 miles, as then constructed from North Market street, St. Louis, to the southern boundary line of Iowa, and from Moberly, Missouri, to North Missouri Junction, in Clay county, Missouri, and as the same might thereafter be constructed through Clay county, a distance of about eight miles, to the bridge across the Missouri river at Kansas City, Missouri; also as the same was or might thereafter be located in or through the city and county of St. Louis, to connect with the Union depot in said city; also as the same was then or might thereafter be located south of North Market street, St. Louis, with all real estate, right of way, and other property and certain lands in St. Louis and in Jackson and Randolph counties, Missouri, and other property more particularly described in said mortgage, a copy whereof is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 13," beginning at page 183 of the printed volumes of exhibits.

82 16. Mortgage made by the St. Louis, Kansas City and Northern Railway Company to the United States Trust Company of New York, trustee, dated Feb-uary 15, 1879, to secure $2,350,000 of bonds due April, 1819, and interest at 7 per cent.,

covering line from Elm Flats, Missouri, to Council Bluffs, about 43½ miles, the portion of said line extending through the counties of Page, Tremont, Mills, and Pottawattamie to Council Bluffs, being leased to said St. Louis, Kansas City and Northern Railway Company by the Council Bluffs and St. Louis Railroad Company. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 28," beginning at page 279 of the printed volumes of exhibits.

17. Guaranty mortgage made by the Council Bluffs and St. Louis Railroad Company, dated Feb-uary 15, 1879, to secure issue of bonds last aforesaid, covering line of road from Council Bluffs, Iowa, to the boundary between Iowa and Missouri. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 27," beginning at page 268 of the printed volumes of exhibits.

And your orators further show that a portion of the property embraced in and covered by said general mortgage consisted of the bridge, with certain real-estate approaches and appurtenances thereto, situate in the county of St. Louis, on the north side of the Missouri river, in the State of Missouri, said bridge extending across said river, and the franchises relating to the use and operation of said bridge approaches and appurtenances, and that the same was originally the property of the corporation known as the St.
83 Charles Bridge Company; that said St. Charles Bridge Company did on October 1, 1868, to secure the payment of $1,000,000 of bonds due October 1, 1878, execute its mortgage upon all said bridge property and franchises to John R. Lionberger and James H. Britton as trustees and issued and sold said bonds; that afterwards, on the 8th of July, 1878, said St. Charles Bridge Company conveyed all said property and franchises to the St. Louis, Kansas City and Northern Railway Company by deed, a copy whereof is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 15," beginning at page 197 of the printed volumes of exhibits; that in order to enable said St. Louis, Kansas City and Northern Railway Company to purchase said bridge said last-mentioned company issued its bonds in the sum of $388,500, bearing interest at 7 per cent., known as St. Charles bridge second-mortgage bonds, due October, 1903, and secured payment thereof by a mortgage to Solon Humphreys and George E. Leighton, trustees, dated July 9, 1878, covering said property.

A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 17," beginning at page 211 of the printed volumes of exhibits.

That on the first day of October, 1878, the said St. Louis, Kansas City and Northern Railway Company made and executed its bonds to the amount of $1,000,000 of principal, with interest at 7 and 8 per cent. (to be exchanged for the bonds secured by said mortgage to John R. Lionberger and James H. Britton), and secured payment of the same by a mortgage dated October 1, 1878, to Henry F. Vail and Charles Parsons, trustees, covering said bridge; and your ora-

tors show upon information and belief that all of said bonds
84 secured by said mortgage to Lionberger and Britton were duly exchanged for said bonds of the St. Louis, Kansas City and Northern Railway Company, but that the same were never cancelled and remain as collateral security for the bonds for which they were exchanged. A copy of said mortgage to Vail and Parsons is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 16," beginning at page 199 of the printed volumes of exhibits.

And your orators further show that of the several railway companies who respectively made and delivered the mortgages aforesaid the following have by divers proceedings of consolidation and foreclosure and sale become merged in the said Wabash, St. Louis and Pacific Railway Company and have no separate corporate existence, namely, the Toledo and Illinois Railroad Company, the Lake Erie, Wabash and St. Louis Railroad Company, the Toledo, Wabash and Western Railroad Company, the Toledo and Wabash Railroad Company, the Wabash and Western Railway Company, the Great Western Railroad Company of 1859, the Illinois and Southern Iowa Railroad Company, the Quincy and Toledo Railroad Company, the Decatur and East St. Louis Railroad Company, the Wabash Railway Company, the North Missouri Railroad Company, and the St. Louis, Kansas City and Northern Railway Company.

And your orators further show that at the time of the execution and delivery of the said general mortgage there existed upon certain lines of railway and property leased to the said Wabash, St. Louis and Pacific Railway Company or to the St. Louis, Kansas City and Northern Railway Company, which became and was consolidated with said Wabash, St. Louis and Pacific Railway Com-
pany, the following-described mortgages, which constitute
85 liens upon the property embraced in and covered by said mortgages respectively prior to the lien of said general mortgage—that is to say:

Mortgages on Leased Lines.

1. Mortgage made by the Toledo, Peoria and Western Railroad Company to Philip Henry Brown, Robert C. Martin, and John Paton, trustees, dated May 22, 1880, to secure $4,500,000 of bonds due October 1, 1917, and interest at 7 per cent., covering line from a point at the eastern boundary of Illinois, where it connects with the Toledo, Logansport and Western Railroad Company, to the western boundary of Illinois, in the city of Warsaw, town of Hamilton, State of Illinois, and also from La Harpe, Illinois, to Burlington, Iowa. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 48," beginning at page 545 of the printed volumes of exhibits.

2. Mortgage made by the Toledo, Peoria and Western Railroad Company to J. P. Giraud Foster, Charles E. Whitehead, and William Hill, trustees, dated May 22, 1880, to secure first-preferred income bonds to the amount of $2,900,000 (whereof $1,189,000 are

outstanding) and interest and second-preferred income bonds to the amount of $1,000,000 covering the line last above mentioned. The said Hill and Whitehead have been since removed as trustees and George J. Gould and Archibald Hopkins substituted in their place and stead. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 49," beginning at page 556 of the printed volumes of exhibits.

86 3. Mortgage made by the Boone County and Booneville Railroad Company to John M. Woodson and Robert A. Betts, trustees, dated May 1, 1873, to secure $100,000 of bonds due May, 1903, and interest at 7 per cent., covering line between Centralia and Columbia, Missouri. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 20," beginning at page 228 of the printed volumes of exhibits.

4. Mortgage made by the St. Louis Ottumwa and Cedar Rapids Railroad Company to Solon Humphreys and George S. Coe, trustees, dated October 1, 1875, to secure $322,500 of bonds due October 1, 1879, and interest at 7 per cent., covering line from Moberly, Missouri, to Ottumwa, Iowa. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 22," beginning at page 239 of the printed volumes of exhibits.

5. Mortgage made by the St. Louis, Council Bluffs and Omaha Railroad Company to James B. Eads and Joseph A. Jameson, trustees, dated September 14, 1872, to secure $626,000 of bonds, known as "compromise bonds," due July 1, 1908, and interest at 6 per cent., covering line from Chillicothe to Elmo Flats, Missouri. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 33," beginning at page 323 of the printed volumes of exhibits.

6. Mortgage made by the Brunswick and Chillicothe Railroad Company to George M. Rice, John Kimball, and Edward P. Burnham, trustees, dated August 1, 1878, to secure $304,500 of

87 bonds due August 1, 1903, and interest at 6 per cent., covering line from Brunswick to Chillicothe. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 24," beginning at page 249 of the printed volumes of exhibits.

7. Mortgage made by the St. Louis, Kansas City and Northern Railway Company to George I. Seney, trustee, dated July 15, 1879, to secure $264,000 of bonds due August 1, 1919, and interest at 6 per cent., covering branch from Roseberry, Missouri, to Clarinda, Iowa. A portion of the said *said* line, viz., 1½ miles, extending from the main line of the Omaha division of the St. Louis, Kansas and Northern railway at a point on the east side of the Nodaway river towards the boundary line between Missouri and Iowa, was conveyed to the said last-mentioned railway company by deed of the Clarinda and St. Louis Railroad Company, dated July 11, 1879, a copy whereof is annexed to and filed with the amendment to the

bill in this suit, marked "Sub-exhibit F. No. 29," and the remaining portion of said line was leased to said St. Louis, Kansas City and Northern Railway Company by lease dated July 15, 1879, a copy of which is annexed to and filed with said amendment, marked "Sub-exhibit F. No. 30." A copy of the said mortgage is annexed to and filed with said amendment, marked "Sub-exhibit F No. 31," beginning at page 395 of the printed volumes of exhibits.

8. Mortgage made by the Quincy, Missouri and Pacific Railroad Company to Solon Humphreys and Orville H. Browning, trustees, dated October 1, 1879, to secure $1,204,000 of bonds due October, 1909, and interest at 6 per cent., covering line from West
88 Quincy, Missouri, — the Missouri river opposite Brownsville, Nebraska.

A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 35," beginning on page 339 of the printed volumes of exhibits.

9. Income mortgage made by the Quincy, Missouri and Pacific Railroad Company to Amos Green and Charles H. Bull, trustees, dated October 1, 1873, to secure $2,000,000 income bonds due October 1, 1909, whereof $1,070,400 are outstanding, covering line last above mentioned.

A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 36," beginning at page 350 of the printed volumes of exhibits.

Your orators further show that after the date of the said general mortgage the said The Wabash, St. Louis and Pacific Railway Company made, executed, and delivered certain mortgages upon specific property acquired by it and forming part of the purchase-money or condition of the acquisition of the property so charged as follows:

Mortgages on After-acquired Property.

1. Mortgage to Henry F. Spaulding and John T. Terry, trustees, dated July 1, 1880, to secure $4,500,000 of bonds due July 1, 1900, and interest at five per cent., covering Chicago and Paducah railway from Effingham to Streator, Illinois, with branch from Effingham to Altamont, and Chicago and Strawn railway from Strawn to Chicago, Illinois, known as the Chicago division.

A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No.
89 44," beginning at page 457 of the printed volumes of exhibits.

2. Mortgage to Henry F. Spaulding and John T. Terry, trustees, dated December 1, 1880, to secure $1,600,000 of bonds, whereof $1,210,000 are outstanding, due December 1, 1910, and interest at six per cent., covering the Champaign, Havana and Western railway from Champaign to White Heath, Illinois, and thence to Havana, Illinois, with a branch from White Heath to Decatur, known as the Havana division, the said line being subject to certain other mortgage made by the Champaign, Havana and Western Railway Company to Henry W. Ford and Richard S. Brock,

trustees, dated July 1, 1879, to secure $1,450,000 of bonds due July 1, 1909, and interest at seven per cent., of which last-mentioned bonds $340,900 are outstanding.

Copies of said mortgages are annexed to and filed with the amendment to the bill in this suit, marked respectively "Sub-exhibit F No. 40," beginning at page 386 of the printed volumes of exhibits, and "Sub-exhibit F No. 41," beginning at page 404 of said printed volumes.

3. Mortgages to the Mercantile Trust Company of New York and James Cheney, trustees, dated respectively July 1, 1881, and November 3, 1881, to secure bonds, whereof about $2,052,000 have been issued, due July 1, 1911, with interest at 6 per cent., covering the Detroit, Butler and St. Louis railway from Detroit, Michigan, to Butler, Indiana, and property at Detroit known as the *the* Detroit division. A copy of said mortgage of November 3, 1881, is annexed to the amendment to the bill in this suit, marked "Sub-exhibit F No. 61," beginning at page 710 of the printed volumes of exhibits.

4. Mortgage to the Mercantile Trust Company of New
90 York, trustee, dated October 1, 1881, to secure $3,857,000 of bonds due October 1, 1931, with interest at 5 per cent., covering line from Danville to St. Francisville, Illinois, and from Vincennes, Indiana, to Cairo, Illinois, known as the Cairo division. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 76," beginning at page 850 of the printed volumes of exhibits.

5. Mortgage to J. P. Giraud Foster and Edward K. Goodenow, trustees, dated September 1, 1880, to secure $73,000 of notes and interest at 6 per cent., covering 14 lots at Burlington, Iowa. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 77," beginning at page 860 of the printed volumes of exhibits.

And your orators further show that the several lines of railway and other property embraced in and covered by said last-mentioned mortgages became and were covered by said general mortgage, subject, however, to the liens of said mortgages respectively.

Your orators further show that after the date of said general mortgage the said The Wabash, St. Louis and Pacific Railroad Company acquired rights and interests in certain other railway lines, and, pur*s*uant to divers contracts and agreements, issued certain of its bonds, secured by said general mortgage, for the purpose of building or extending certain specific lines of railway, and that the several railway corporations to whom said bonds were so delivered made, executed, and delivered to your orators certain mortgages or deeds of trust covering their respective lines of railway as
91 further security for the payment of the bonds so delivered, and that said mortgages are as follows:

Sustaining Mortgages.

1. Mortgage made by the Des Moines Northwestern Railway Company, dated February 28, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $7,000 per mile of completed road, covering line from Panora to Waukee and proposed extensions from Panora to Sioux City and Spirit Lake and from Waukee to Des Moines. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 59," beginning at page 700 of the printed volumes of exhibits.

2. Mortgage made by the Champaign and Southeastern Railway Company, dated March 1, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $15,000 per mile of road, covering line from Champaign to Sidney, Illinois. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 67," beginning at page 762 of the printed volumes of exhibits.

3. Mortgage made by the St. Louis, Jerseyville and Springfield Railroad Company, dated November 4, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $15,000 per mile of road, covering line from a point at or near New Berlin to a point at or near Grafton or Jersey Landing, Illinois. A copy of said mortgage is annexed to and filed with the amend-
92 ment to the bill in this suit, marked "Sub-exhibit F No. 65," beginning at page 742 of the printed volumes of exhibits.

4. Mortgage made by the Des Moines and St. Louis Railroad Company, dated December 1, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $15,000 per mile of road, covering line from Des Moines to Albia, Iowa. A copy of said mortgage is annexed to and filed with the amendment to the bill is this suit, marked "Sub-exhibit F No. 57," beginning at page 679 of the printed volumes of exhibits.

5. Mortgage made by the Attica, Covington and Southern Railway Company, dated February 17, 1881, to secure said general mortgage bonds, delivered or to be delivered at the rate of $10,000 per mile of road, covering line from Attica to Covington, Indiana, about 14.5 miles. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 63," beginning at page 729 of the printed volumes of exhibits.

All of said five last-mentioned mortgages were duly recorded as required by law, and your orators respectfully pray leave to produce and refer to the several and respective originals of said last-mentioned mortgages when the same shall be produced upon the hearing of this cause.

Your orators further show that after the date of said general mortgage the said The Wabash, St. Louis and Pacific Railway Company acquired by purchase or lease or contract in the nature of lease divers other lines of railway and other property, and the

said lines of railway and property, so far as your orators have been able to ascertain, are as follows:

93 1. The Indianapolis, Peru and Chicago railway, covering line from Indianapolis to Peru, and the Michigan City and Indianapolis railway, from Michigan City to La Porte, leased to the said Wabash, St. Louis and Pacific Railway Company, which executed and delivered bonds to the amount of $2,275,000, due June 1, 1921, bearing interest at 6 per cent., to pay for the same, secured by mortgage made by the Indianapolis, Peru and Chicago Railway Company to Abram W. Hendricks and Wager Swayne, trustees, dated June 1, 1881, covering its line of railway, and by mortgage made by the Michigan City and Indianapolis Railroad Company, of same date, to the same trustees, covering the line of said last-mentioned company, $275,000 of said bonds being made for the purpose of taking up a like amount of bonds, due July 1, 1891, and interest at 7 per cent., secured by a prior mortgage made by said Indianapolis, Peru and Chicago Railway Company to Clifford A. Hand, trustee, dated June 20, 1871, the said line of the Indianapolis, Peru and Chicago Railway Company being also subject to a mortgage made by the Chicago, Cincinnati and Louisville Railroad Company to George T. M. Davis, trustee, dated January 1, 1867, to secure $1,000,000 of bonds, due January 1, 1887, and interest at 7 per cent. A copy of said mortgage of June 1, 1881, is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 72," beginning at page 807 of the printed volumes of exhibits. A copy of said mortgage of June 20, 1871, is also annexed to and filed with said amendment, marked "Sub-exhibit F No. 71," beginning at page 795 of said printed volumes, and a copy of said mortgage of January 1, 1867, is also annexed to and filed with said amendment, marked "Sub-exhibit F No. 70," beginning at page 784 of said printed volumes.

94 2. The Missouri, Iowa and Nebraska railway, covering line from Keokuk, Iowa, to Van Wert, Iowa, leased to the said Wabash, St. Louis and Pacific Railway Company, which executed and delivered bonds to the amount of $2,269,000, due March, 1921, with interest at 6 per cent. per annum, to pay for the same, secured by mortgage (known as the Iowa division mortgage) made by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company, trustee, dated March 1, 1881, covering the line last aforesaid. A copy of said mortgage is annexed to and filed with the amendment to the bill and marked "Sub-exhibit F No. 51," beginning at page 601 of the printed volumes of exhibits.

3. The Centerville, Moravia and Albia railroad from Centerville to Albia, Iowa, about twenty-four miles, leased to the Missouri, Iowa and Nebraska railroad and by it leased to the Wabash, St. Louis and Pacific railway, subject to mortgage to the Farmers' Loan and Trust Company of New York, trustee, to secure $400,000 of bonds due in 1920 and interest at 6 per cent. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 53," beginning at page 627 of the printed volumes of exhibits.

4. The Havana, Rantoul and Eastern railway from Mt. Lebanon, Indiana, to Le Roy, Illinois, about 76 miles, subject to a mortgage to Thomas B. Coulter, trustee, dated December 26, 1879, to secure $300,000 of bonds due July 1, 1897, and interest at 6 per cent. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 55," beginning at page 646 of the printed volumes of exhibits.

95 5. The Springfield and Northwestern railway, extending from Springfield, Illinois, to Havana, Illinois, about $44\frac{1}{10}$ miles. A copy of the deed of conveyance of said railway is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 93," beginning at page 1014 of the printed volumes of exhibits.

6. The Peoria, Pekin and Jacksonville railway from Hollis to Jacksonville, Illinois, about $72\frac{1}{2}$ miles, and portion from Hollis to Peoria, Illinois, $7\frac{7}{10}$ miles, leased by the Toledo, Peoria and Western Railroad Company and included in the lease to the Wabash, St. Louis and Pacific Railway Company.

7. Branch railroad from the Chicago division to the Braidwood coal-fields, about 12 miles.

8. The Humeston and Shenandoah railroad, from Humeston, Iowa, to Shenandoah, Iowa, about 113 miles.

The portion of said line from Humeston, Iowa, to Prairieville, Iowa, about 17 miles, was duly conveyed to said Wabash, St. Louis and Pacific Railway Company and became subject to the said mortgage made by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company of New York, known as the "Iowa Division" mortgage, and was thereafter sold to the Humeston and Shenandoah Railroad Company, which leased its entire line from Humeston to Shenandoah to the Chicago, Burlington and Quincy Railroad Company and the Wabash, St. Louis and Pacific Railway Company in perpetuity. A copy of said lease is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 79," beginning at page 895 of the printed volumes of exhibits. The said Humeston and Shenandoah Railroad Company has issued bonds to the amount of $2,684,000, due

96 March 1, 1911, and bearing interest at 7 per cent., secured by mortgage to William J. Ladd and John T. Terry, trustees, bearing date March 31, 1881, and covering said line of railway, and said bonds to the amount of $1,184,000 (being those numbered from 1501 to 2684, inclusive) are guaranteed by the Wabash, St. Louis and Pacific Railway Company, pursuant to the terms of said lease. A copy of said mortgage is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 80," beginning at page 913 of the printed volumes of exhibits.

9. Peoria and Pekin Union railway from Pekin, Illinois, to Peoria, Illinois, including the Peoria and Springfield railway, about $10\frac{2}{10}$ miles, with depot rights and terminal facilities. Said railway and property was leased by the Peoria and Pekin Union Railway Company to the Indianapolis, Bloomington and Western Railroad Company, the Wabash, St. Louis and Pacific Railway Company,

the Peoria and Jacksonville Railroad Company, and the Peoria, Decatur and Evansville Railway Company. A copy of said lease is annexed to and filed with the bill in this suit, marked "Sub-exhibit F No. 78," beginning at page 872 of the printed volumes of exhibits.

Said railway and property are subject to two mortgages, viz., a first mortgage made by said Peoria and Pekin Union Railway Company to your orator, The Central Trust Company of New York, as trustee, dated Feb-uary 1, 1881, to secure $1,500,000 of bonds due Feb-uary 1, 1921, and interest at six per cent., and a second or income mortgage to your orator, The Central Trust Company of New York, dated Feb-uary 1, 1881, to secure $1,500,000 income bonds due Feb-uary 1, 1921, and your orator pray- leave to
97 produce and refer to the originals of said mortgages upon the hearing of this cause.

10. St. Louis bridge and tunnel, leased by the St. Louis Bridge Company and the Tunnel Railroad of St. Louis to the Wabash, St. Louis and Pacific Railway Company and the Missouri Pacific Railway Company jointly, a copy of which lease is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit No. 81," on page 925 of the printed volumes of exhibits. A portion of said property is subject to a mortgage to J. C. Rogers and Charles Edward Tracy, trustees, dated April 1, 1879, securing bonds to the amount of $500,000.

11. Hannibal bridge, leased by the Hannibal Bridge Company to the Wabash, St. Louis and Pacific Railway Company and the Missouri Pacific Railway Company by lease dated January 1, 1883, a copy whereof is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 82," beginning at page 933 of the printed volumes of exhibits.

Your orators further show that the recitals, stipulations, and agreements of the several mortgages and deeds of trust and other instruments aforesaid are fully shown in the several copies thereof filed as aforesaid, and your orators pray that each and every of said copies may be taken as a part of this their cross-bill as fully as if incorporated into the body of it, and your orators refer to said copies and each and every thereof as showing the property embraced in and covered by said mortgages and other instruments respectively and the conditions and agreements contained therein.

And your orators further show that said Wabash, St. Louis and Pacific Railway Company has acquired a large amount of valuable property in addition to that hereinbefore set forth, which is
98 subject to the lien of said general mortgage, and which your orators are unable to describe with particularity.

Your orators further show that on or about the 10th day of April, 1883, the said The Wabash, St. Louis and Pacific Railway Company executed and delivered to the St. Louis, Iron Mountain and Southern Railway Company, a corporation created by and existing under the laws of the State of Missouri, an indenture of lease whereby said first-mentioned corporation leased to said last-mentioned corporation all its lines of railroad, whether owned or leased,

upon the terms and conditions therein stated and set forth, a copy of which indenture of lease, marked Exhibit C, is annexed to and filed with the amendment to the bill in this suit, beginning at page 22 of the printed volumes of exhibits, and your orators pray leave to refer to the same as if it were herein fully and at large set forth.

That the said lessee company, after the making of said lease, operated the said lines of railroad and continued so to do until the appointment of the receivers hereinafter mentioned.

Your orators further show that thereafter, to wit, on or about the 1st day of May, 1883, the said The Wabash, St. Louis and Pacific Railway Company, being the owner and in possession of or having valuable rights and interests in certain bonds, shares of stock, steamers, rolling stock, and real property, made, executed, and delivered to the Mercantile Trust Company of New York, as trustee, an indenture of trust for the purpose of securing a number of bonds of said railway company known as collateral trust bonds, amounting to $10,000,000, dated May 1, 1883, payable in twenty years from the date thereof, with interest at the rate
99 of six per cent per annum, payable semi-annually, on the 1st days of May and November of each year; that a copy of said last-mentioned indenture is filed with the amendment to the bill of complaint, marked Exhibit D, beginning at page 33 of the printed volumes of exhibits, and your orators pray leave to refer to the same as if it were herein fully and at large set forth; that the said St. Louis, Iron Mountain and Southern Railway Company united in the execution of said indenture and guaranteed the payment of the principal and interest of said collateral trust bonds.

Your orators further show that, as they are informed and believe, as to a large part, if not all, of the property mentioned in said indenture of trust the said general mortgage is a lien prior and superior to the alleged lien of said collateral trust mortgage.

Your orators further show that on or about the 21st day of December, 1883, the Wabash, St. Louis and Pacific Railway Company made, executed, and delivered to the St. Louis, Iron Mountain and Southern Railway Company a deed of indenture conveying to said last-mentioned company all its lines of railway and all its property, choses in action, incomes, rents, and profits by way of mortgage to secure payment of the principal and interest of said collateral trust bonds to indemnify the said mortgagee in respect to its guaranty of said collateral trust bonds and to secure payment to said mortgagee of all other money paid by said Iron Mountain Company for the benefit of or lent or advanced to said mortgagor and all debts to said Iron Mountain Company from said mortgagor; that said last-mentioned indenture has been recorded, but is in all respect subject and subordinate to the said general mortgage; that a copy thereof, marked Exhibit F, is filed with the amendment to
100 said bill, beginning at page 17 of the printed volumes of exhibits, and your orator prays leave to refer to the same as if the same were made a part of this bill.

Your orators further show that on the 2d day of June, 1884 (the first day of June, 1884, being Sunday), there became due and paya-

ble and accruing upon the bonds secured by said general mortgage a semi-annual installment of the interest, evidenced by the coupons attached to said bonds, due on said last-mentioned day; that default was made in the payment of the interest on said bonds and of the said installment of interest accruing on said bonds as aforesaid; that the said Wabash, St. Louis and Pacific Railroad Company wholly failed, omitted, and refused to pay the said installment of interest and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day, or any of them, but therein wholly made default; that a large number of said coupons representing said installment of interest due and payable on said 2d day of June, 1884, were, on said last-mentioned day or shortly thereafter, actually presented for payment at the place where the same were and are payable, to wit, at the office or agency of the Wabash, St. Louis and Pacific Railway Company, in the city of New York, and payment thereof was demanded and refused; that prior to June 1, 1884, the said Wabash, St. Louis and Pacific Railway Company or the officers thereof, or some of them, gave public notice, by circular and otherwise, that the said railway company would not pay the interest accruing on its said general mortgage bonds and other obligations on the 1st of June, 1884, and that by reason of the matters aforesaid default has been made by the said Wabash, St. Louis and Pacific Railway Company in the
101 performance of the terms and provisions of said general mortgage and the conditions of said general mortgage have become and are broken and the said several conveyances to your orators, as trustees as aforesaid, have become and are absolute.

Your orators further show that on or about the 1st day of November, 1862, the Toledo and Wabash Railway Company issued a series of bonds amounting to $600,000 of principal, known as "equipment bonds," and that for the payment of the principal and interest of a large number thereof James Compton and David J. Tyson, Jr., claim some lien upon the portion of the road of the Wabash, St. Louis and Pacific Railway Company, formerly owned by the Toledo and Wabash Railway Company, of the nature and extent whereof your orators are not informed save by the amendment to the bill in this suit.

Your orators further show upon information and belief that the portion of the line of road of said Wabash, St. Louis and Pacific Railway Company known as the Edwardsville branch, extending from Edwardsville, Illinois, to Edwardsville Junction, Illinois, about 8.5 miles, was sold to the Wabash Railway Company in or about the year 1877, and the consideration paid therefor, but that for some reason no deed of conveyance thereof was ever made or delivered to said Wabash Railway Company or to its successors.

Your orators further show that on or about the 25th day of October, 1879, the Chicago and Western Indiana Railroad Company, a corporation organized under the laws of Illinois, leased a portion of its railroad and other property to the Wabash, St. Louis and Pacific Railway Company, and reference is hereby made to a copy of

said lease annexed to and filed with the amendment of the
102 bill in this suit, marked "Sub-exhibit F No. 45," beginning on page 471 of the printed volumes of exhibits; that the said property was and is subject to the lien of a mortgage dated July 1, 1879, to Anthony J. Thomas, trustee; that thereafter and on or about 1st day of November, 1882, the said Chicago and Western Indiana Railroad Company executed and delivered to the said Wabash, St. Louis and Pacific Railway Company a supplementary lease, a copy whereof is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 46," beginning at page 503 of the printed volumes of exhibits, and your orators pray that said copies may be taken as a part hereof as if they were fully incorporated into the body of this cross-bill.

Your orators further show that since the execution and delivery of said general mortgage the said Wabash, St. Louis and Pacific Railway Company has acquired certain rights and interests under an agreement made between it and the Chicago, St. Louis and Pittsburgh Railroad Company and the Indianapolis, Peru and Chicago Railroad Company, a copy of which agreement is annexed to and filed with the amendment to the bill in this suit, marked "Sub-exhibit F No. 73," and your orators pray that the same may be taken as a part hereof as if the same were fully incorporated into the body of this cross-bill.

Your orators further show upon information and belief that Edwin D. Morgan, the sole trustee under the said mortgage of the Toledo and Wabash Railroad Company, dated October 15, 1858, and under the said mortgage of the Wabash and Western Railway Company, dated October 15, 1858, and cotrustee with Louis H. Meyer
under the mortgage of the North Missouri Railroad Com-
103 pany, dated March 9, 1865; George Griswold, one of the trustees under the said mortgage of the Great Western Railroad Company of 1859, dated May 25, 1863; Lucien Tilton, one of the trustees under said mortgage of the Illinois and Southern Iowa Railroad Company, dated March 1, 1862; Orville H. Browning, one of the trustees under said mortgage of the Quincy, Missouri and Pacific Railroad Company, dated October 1, 1879, and H. F. Vail, one of the trustees under the mortgage made by the St. Louis, Kansas City and Northern Railway Company, dated October 1, 1878, have departed this life; that under some of said mortgages a successor or successors to deceased trustees cannot be appointed in the mode provided by such mortgages, and that under others thereof no such successor has been appointed, and your orators pray (as is also prayed in the original bill in this suit) that if the owners of bonds secured by said trust deeds shall fail or refuse to apply for and obtain the appointment of such successor or successors, your honors will permit such owners of said classes of bonds as may be discovered to be made defendants herein as representatives of the classes to which they severally belong; but your orators on information and belief aver that while said bondholders or their trustees are proper parties to be made defendants in this cross-bill, yet this

litigation and any decree rendered therein will not so far affect their interest as to render them indispensable parties.

And your orators further show that the several parties defendant in this suit whose interests are not hereinbefore stated or specified have or claim to have some lien upon or interest in the said railway and property owned by and embraced in said general mort-
104 gage, of the nature and extent of which alleged liens or interest *of* your orators are not informed.

And your orators further show that, as they are informed and believe, the said Wabash, St. Louis and Pacific Railway Company did, after the execution, delivery, and recording of said general mortgage, from time to time make and issue its promissory notes for very large sums of money and procured the same to be endorsed by Solon Humphreys and divers other persons whose names are unknown to your orators; that the said railway company sold said notes to the Equitable Life Assurance Company of New York and pledged with the endorsers thereof certain of the said collateral trust bonds by way of security for the payment of the same; and your orators further show unto your honors that they intended and proposed to bring their bill of complaint in this honorable court for the foreclosure of the said general mortgage and to protect the rights and interests of the holders of the bonds and coupons secured thereby by a sale of the said mortgage property so soon as default should be made in the performance of the terms and conditions of said general mortgage; but now so it is, may it please your honors, that the said The Wabash, St. Louis and Pacific Railroad Company, combining and confederating with Solon Humphreys and divers other persons at present unknown to your orators, whose names when discovered your orators pray they may be at liberty to insert herein and afterwards to charge them as parties defendant hereto, has lately and before the first day of June, 1884, filed its bill in this honorable court against your orators and the several persons who are named as trustees in the several mortgages aforesaid
105 and the railway corporations aforesaid and others, and has since filed its amendment to said bill, praying, among other things, that this court take cognizance of said bill and appoint one or more receivers of the said railways and property and direct such receivers to take possession of and operate the same; that the court under said bill or under such cross-bills as the parties in interest may also file may decree the sale of said entire property and cause all the liens upon the same or any part thereof and all rights, claims, and equities of all persons interested therein to be ascertained, and that the proceeds arising from the sale of such property or any part thereof be applied under the orders and decrees of this court according to the rights, interests, and equities of parties or persons interested in said fund.

That in and by the said bill the said railway company avers and states, and your orators also, upon information and belief, aver, that said railway company is for the time being practically insolvent and unable to pay its floating debt or the interest accruing on the bonds and other obligations for the payment whereof it is liable;

and said railway company pretends that the notes aforesaid, upon which it alleges there will be due at maturity about the sum of $2,200,000, were issued and applied to provide means for the meeting of its expenses and the keeping of its road in successful operation and completing its line, as well as to pay interest accruing on bonds secured by mortgages prior and superior to those secured by said general mortgage, and also maturing installments of the purchase-money of rolling stock necessary and indispensable to the use of the said road, and therefore the said railway company
106 prays this court shall make preliminary orders or decrees to enable the receiver or receivers appointed under said bill to protect the endorsers upon said notes and prevent the foreclosure of the collateral trust aforesaid; that your orators are not informed, save by said bill, whether or not the said notes or any of them were in fact issued or applied for the purposes aforesaid or any of them, and they therefore deny the several allegations in that behalf contained in said bill, and they insist that said notes are not equitably entitled to be paid, protected, or provided for in preference to the said general mortgage bonds and coupons. Your orators further show that such proceedings have been had under said last-mentioned bill that Solon Humphreys and Thomas E. Tutt have, by the orders of this honorable court, been appointed receivers, as prayed in and by said bill, and have qualified as such, and that they have been also appointed receivers by orders of the circuit court of the United States for the other districts wherein said lines of railway are situate under ancillary bills filed by said railway company in aid of the said bill so as aforesaid filed in this honorable court; that an order has been made by this court directing the said receivers to protect by their obligations the said promissory notes as they severally mature, and your orators are apprehensive that the said lines of railway and property embraced in and covered by said general mortgage may be subjected to the payment of said notes and of the general debts of said railway corporation in preference to the said general mortgage bonds and coupons, all of which is contrary to equity and good conscience and to the manifest wrong and injury of your orators and of the
107 owners and holders of the bonds and coupons which they represent. Your orators further show that unless the said lines of railway shall be operated, managed, or controlled by a receiver or receivers appointed by the court there will be a multiplicity of suits and judgments against said railway company, which will obstruct the operation of said railways and cause great loss to the holders of the bonds aforesaid and a sacrifice of the property of the said railway company.

Your orators further show that no proceedings at law have been had nor any suit or action commenced by or on behalf of your orators or of any holders of said general mortgage bonds, so far as your orators have any knowledge, for any interest unpaid or accrued thereon.

Wherefore, and forasmuch as your orators are remediless in the premises according to the strict rules of the common law and can

only have relief in a court of equity, where matters of this nature are properly cognizable and reviewable, to the end, therefore, that the said defendants may be required to make answer respectively to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were here expressed and they thereunto particularly interrogated, but not under oath, answers under oath being hereby expressly waived, that an account be had and taken of the bonds and coupons secured by said general mortgage and of the amount due thereon; that the names of the lawful holders thereof may be ascertained; that an account be taken of the general mortgage bonds which are also secured by the several mortgages made to your orators and hereinbefore styled "sus-
108 taining mortgages;" that an account be also taken of all the property of the said Wabash, St. Louis and Pacific Railway Company, whether acquired before or after the execution of said general mortgage, and that an account be also taken of all the liens and encumbrances upon the same or any part thereof and the priorities thereof determined; that the said general mortgage may be decreed to be a first lien upon all the railroads and other property described therein, subject only to such liens as are therein and thereby recited and declared to be liens prior thereto; that this court may appoint successors to any deceased trustees as may be necessary for the proper execution of their several trusts, or may make such other order as may be required in order that said trusts may be properly represented in this suit; that any and all orders heretofore made authorizing the issuing of receivers' certificates or obligations with the view of making said certificates or obligations a charge upon the premises and property mortgaged to your orators may be vacated; that the several defendants may be required to answer this amended cross-bill and state and set up their respective interests in said property; that the said property may be sold at a judicial sale thereof free from the claims of all parties hereto, and from the claims of all persons whose interests are in any manner represented by any party hereto, under the judgment or decree of this honorable court, and upon such terms and conditions as to the court shall seem meet and proper; that each and all of said defendants and all persons in like situation with them or any of them, and all persons claiming or to claim by, from, or under them or any of them, may from and by said sale be absolutely barred and foreclosed
109 of and from all right and equity of redemption of, in, and to any and all of the property of said Wabash, Pacific and St. Louis Railway Company; that the said judgment or decree may contain such provisions with respect to priorities of liens and the due application of the proceeds of sale according to the rights of the parties as may be just and equitable; that if such proceeds be insufficient to pay and satisfy the amount due on said general mortgage bonds and coupons the said Wabash, St. Louis and Pacific Railway Company may be adjudged to be liable and may be required to pay to your orators the amount of any deficiency which may remain; that pending this suit a receiver or receivers may be appointed, according to the course and practice of this court, with

the usual powers of receivers in like cases, of all and singular the mortgaged property and premises and the property, franchises, equitable interests, things in action, effects, moneys, receipts, bills, incomes, earnings, rights, privileges, and immunities of said company connected with or relating to said mortgaged premises, and of all the rolling stock, machinery, equipment, and other property incident to the same, and that said receiver or receivers may be authorized and directed to maintain and operate said railroads and to keep the same in proper repair, and to receive, collect, and preserve all the property, assets, and income of said company, and that such other orders or directions may be made in respect to said receivership as may be equitable and proper; that any and all orders heretofore made whereby payment of the said promissory notes or any of them is or may be charged upon the mortgaged premises may be vacated; that an injunction may issue restraining the de-
110 fendants and each of them from interfering with, transferring, selling, or disposing of any of the said property and from taking possession of, levying upon, or attempting to sell the same or any part thereof, and that your orators may have such other or further relief as the nature of the case may require and to your honors seem meet:

May it please your honors to grant unto yonr orators a writ of subpœna, to be directed to the said defendants, The Wabash, St. Louis and Pacific Railway Company, The St. Louis, Iron Mountain and Southern Railway Company, The Mercantile Trust Company, The Farmers' Loan and Trust Company of New York, The United States Trust Company of New York, James R. Jessup, John T. Terry, Daniel A. Lindley, Alfred T. White, Henry F. Spaulding, Wager Swayne, Louis H. Meyer, J. P. Giraud Foster, Clifford A. Hand, Robert C. Martin, George J. Gould, George S. Coe, George T. M. Davis, George I. Seney, John Paton, Alexander M. White, David J. Tyson, Jr., Henry H. Worden, John N. A. Griswold, Charles E. Whithead, William Hill, Edward K. Goodenow, Anthony J. Thomas, Edward De Rose, Henry A. Mott, Charles Jackson, G. M. Whittemore, James H. Britton, Joseph A. Jameson, Townsend Underhill, George M. Rice, William J. Ladd, J. C. Rogers, Solon Humphreys, Benjamin Ham, Henry W. Ford, Archibald Hopkins, James Compton, John M. Woodson, James B. Eads, Charles Parsons, John R. Lionberger, George E. Leighton, Robert E. Betts, Isaac H. Knox, Abram W. Hendricks, Amos Greene, Thomas B. Coulter, Charles H. Bull, Thomas Mayo, Edward P. Burnham, Henry Phelps, Philip Henry Brown, Richard S. Brock, John Kimball, The Metropolitan National Bank, The Eel River Railroad Company, The Indianapolis, Peru and Chicago Railway Company, The Michigan City and Indianapolis Railroad
111 Company, The Chicago, Cincinnati and Louisville Railroad Company, The Attica, Covington and Southern Railroad Company, The Toledo, Peoria and Western Railroad Company, The St. Louis, Jerseyville and Springfield Railroad Company, The Champaign and Southeastern Railway Company, The Havana, Rantoul and Eastern Railroad Company, The Peoria and Pekin Union Rail-

way Company, The Chicago and Western Indiana Railroad Company, The Boone County and Booneville Railroad Company, The St. Louis, Ottumwa and Cedar Rapids Railroad Company, The St. Joseph and St. Louis Railroad Company, The Brunswick and Chillicothe Railroad Company, The St. Louis, Council Bluffs and Omaha Railroad Company, The St. Louis Bridge Company, The St. Louis, Kansas City and Northern Railway Company, The Quincy, Missouri and Pacific Railway Company, The Hannibal Bridge Company, The Tunnel Railroad of St. Louis, The Des Moines and St. Louis Railroad Company, The Council Bluffs and St. Louis Railway Company, The Clarinda and St. Louis Railroad Company, The Missouri, Iowa and Nebraska Railway Company, The Humeston and Shenandoah Railroad Company, and The Des Moines and Northwestern Railroad Company, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, and then and there severally to answer all and singular the matters aforesaid (but not under oath), and to stand to, abide, and perform such other or further orders and decrees therein as to your honors shall seem meet.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Complainants, 111 *Broadway, New York, N. Y.*

T. H. HUBBARD, *Of Counsel.*

112 UNITED STATES OF AMERICA, }
Southern District of New York. }

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Frederick P. Olcott, being duly sworn, says that he is the president of the Central Trust Company of New York, one of the complainants in the above-amended cross-bill; that the said amended cross-bill is true of his own knowledge except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

F. P. OLCOTT.

Sworn to before me this 16 day of October, 1884.

C. S. SIMPSON,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) Filed Oct. 20, 1884. Wm. H. Bradley, clerk.

113 Afterward, to wit, on the thirteenth day of December, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

This day came George D. O'Brien, attorney for Patrick Larner, administrator of the estate of John Larner, deceased, and represents to the court that on December fifteenth, 1882, the said John Larner, whilst in the employ of the Wabash, St. Louis and Pacific Railway Company, was killed by the carelessness, negligence, and default of said company; that letters of administration were issued for the purpose of beginning suit against said company for causing the death of deceased. It is therefore ordered by the court that the receivers of said company, within twenty days from the date of a service of a copy of this order upon them or their solicitors, show cause why the prayer of the petition of said O'Brien should not be granted and the claim of the administrator of said estate should not be paid.

114 Afterward, to wit, on the twelfth day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

On motion of Mr. Willard, for Pennsylvania Railroad Company, leave is hereby given him to file an intervening petition herein, and it is ordered that the receivers in this cause answer said petition within fifteen days.

On the same day, to wit, on the twelfth day of January, 1885, came the Pennsylvania Railroad Company, by its solicitor, and filed in said clerk's office its intervening petition in said entitled cause; which said intervening petition is in the words and figures following, to wit:

115 *Intervening Petition of the Pennsylvania Railroad Company.*

In the Circuit Court of the United States, Northern District of Illinois, December Term, A. D. 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, *et al.*
} Bill for Appointment of Receiver, etc.

The intervening petition of the Pennsylvania Railroad Company.

To the honorable the judges of said court:

Your petitioner, The Pennsylvania Railroad Company, represents and shows unto the court that it is a corporation created and existing under and by virtue of the laws of the State of Pennsylvania for the purpose of transporting freight and passengers for hire; that on December 1, 1880, and during several years prior thereto it operated and since said date has continued to operate numerous lines of railroad, including a line of railroad from Philadelphia, in the State of Pennsylvania, to Jersey City, in the State of New Jersey, from which latter point freight and passengers were and are ferried across Hudson river to the city of New York.

That on and prior to said date The Wabash, St. Louis and Pacific Railway Company, complainant in the above-entitled action, had issued and sold and received pay for coupon tickets, so called,
116 purporting to entitle the holders respectively to passage between such points on its line and such points on your petitioner's line as were designated thereon and intermediately over such other lines as composed the various routes from starting points on the line of said Wabash, St. Louis and Pacific railway line to points of destination on the line of your petitioner.

That during the time aforesaid permission on the part of your petitioner and on the part of the managers or operators of other lines of railway for the sale of coupon tickets over such lines respectively by the proprietor or operator of another line of railway was by custom given or withheld according to what appea-ed to them to be for the best interests of their lines respectively.

That said Wabash, St. Louis and Pacific Railway Company prior to the date above mentioned had issued and sold and collected pay for a number of such coupon tickets purporting to entitle the holder to passage from Omaha, in the State of Nebraska, to the city of New York aforesaid via its own line from Omaha aforesaid to the city of St. Louis, in the State of Missouri; thence over the line of the Ohio and Mississippi railway to Cincinnati, in the State of Ohio; thence over the line of the Marietta and Cincinnati railway to Parkersburg, in the State of West Virginia; thence over the line of the Baltimore and Ohio railway to Baltimore, in the State of Maryland; thence over the line of the Philadelphia, Wilmington and Baltimore

railway to Philadelphia aforesaid, and thence over the line of your petitioner to the city of New York aforesaid.

That on said December 1, 1880, your petitioner directed
117 and ordered the said Wabash, St. Louis and Pacific Railway Company to discontinue the sale of coupon tickets reading via the said Baltimore and Ohio railway and the line of your petitioner to points north and east of Philadelphia, which said direction consisted of a telegraphic message reading substantially as follows, to wit:

"DECEMBER 1ST, 1880.

"George H. Daniels, Wabash, St. Louis & Pacific railway, St. Louis, Missouri:

"On receipt hereof please discontinue sale of tickets to all points north and east of Philadelphia, reading via Baltimore & Ohio railroad and this line. Please answer.

"L. P. FARMER."

That said George H. Daniels, who was then the general ticket agent of the said Wabash, St. Louis and Pacific Railway Company and a proper officer to receive and act upon said direction, thereupon, on receipt of said message, replied to the same substantially as follows, to wit:

"ST. LOUIS, MISSOURI, *December 1st*, 1880.

"L. P. Farmer:

"Tickets reading via Baltimore & Ohio railroad to points east and north of Philadelphia have been ordered off sale.

"GEO. H. DANIELS."

That on or about December 2, 1880, a general notice was issued by your petitioner, and a copy thereof was mailed, addressed to an agent of the said Wabash, St. Louis and Pacific Railway
118 Company at St. Louis aforesaid; which said copy, with its address, is substantially as follows, to wit:

"Pennsylvania Railroad Company, passenger department.

"PHILADELPHIA, *Dec. 2nd*, 1880.

"*General Notice.*

"Connecting railway and transportation lines are hereby notified to discontinue the sale of tickets and the checking of baggage over this line between Philadelphia and New York or other points via the Baltimore and Ohio railroad from date, and are respectfully informed that such tickets will not be honored or baggage received or forwarded after December 10th, 1880.

"By order of the 1st vice-president.

"L. P. FARMER,
"*Gen. Pass. Agent.*"

That subsequently and on or about December 7, 1880, your petitioner received from said Wabash, St. Louis and Pacific Railway

Company a written acknowledgment of the receipt of said notice substantially as follows, to wit:

"WABASH, ST. LOUIS & PACIFIC R'Y, *Dec. 4th*, 1880.

"H. C. Townsend, general passenger agent.

"L. P. Farmer, general passenger agent Pennsylvania Railroad Company, Philadelphia:

"I have received this day notice to discontinue the sale of tickets between Philadelphia and New York or other points by the Baltimore and Ohio railroad and your line.

"H. C. TOWNSEND."

119 That, relying in good faith upon the aforesaid telegram from said George H. Daniels, your petitioner thereupon informed its agents who, in the capacity of conductors, had charge of the collection of fares on its passenger trains that the sale of such coupon tickets had been withdrawn on December 1, 1880, and your petitioner thereupon instructed its said agents not to receive in payment of fares the coupons of any such coupon tickets issued after said date; that said Wabash, St. Louis and Pacific Railway Company having notified the said Baltimore and Ohio Railway Company of the direction of your petitioner given as aforesaid, the said Baltimore and Ohio Railway Company, by L. M. Cole, its agent, in answer to said notice, sent a telegraphic message to said Wabash, St. Louis and Pacific Railway Company substantially as follows, to wit:

"The American Union Telegraph Co.

"This telegram rec'd at N. W. corner 3rd and Pine Sts., dated—

"BALTIMORE, MD., *Dec.* 2, 1880.

"To Geo. H. Daniels, Wabash R'y, St. L.:

"Please get up quickly tickets to New York and points east by B. & O. and Bound Brook route trains run Chicago & Cin'ti N. Y. without change. Coupons should read Balto. Phila. Boundbrook R. R. Phila. and Reading R. R. Phila. & Boundbrook Central R. R. New Jersey. Boundbrook, N. Y. Until you get them on continue sales Penn. R. R. tickets by B. & O. reporting entire proportion east Baltimore to B. & O. We are exchanging and will protect. Answer.

"L. M. COLE."

120 Which said message was received by said Daniels on or about the day of its date; that said Daniels, as ticket agent of the said Wabash, St. Louis and Pacific Railway Company, relying, as your petitioner believes and charges the fact to be, upon the proffered protection offered by the said Baltimore and Ohio Railway Company, by L. M. Cole, its agent as aforesaid, continued the sale of such coupon tickets on and after the 2d day of December, 1880, without any notice thereof to or knowledge on the part

of your petitioner; and, without any notice to or knowledge on the part of your petitioner, the said Wabash, St. Louis and Pacific Railway Company, by its local ticket agent at Omaha aforesaid, on the 7th day of said December, 1880, sold and delivered to one William J. Connell a coupon ticket purporting to entitle the holder to transportation from Omaha aforesaid to the city of New York aforesaid over the said Wabash, St. Louis and Pacific railway, the Marietta and Cincinnati railway, the Baltimore and Ohio railway, the Philadelphia, Wilmington and Baltimore railway, and your petitioner's said railway.

That on or about December 16, 1880, the said William J. Connell, then the holder of said ticket, took passage upon a train of your petitioner at Philadelphia aforesaid, bound for the city of New York; that after said train had started on its way and was a short distance from Philadelphia the said Connell was called upon by the conductor of said train for fare; whereupon said Connell produced and offered to the conductor, in payment of fare from Philadelphia to the city of New York, one of the coupons of a coupon ticket (of the issuance and existence of which your petitioner was not aware) of the same kind which your petitioner had been informed by the said Wabash, St.
121 Louis and Pacific Railway Company had been withdrawn from sale on the 1st day of December, 1880; that the said conductor (B. F. Wilson by name) thereupon informed the said Connell that said ticket was not good for such passage, and truthfully informed him further that it would be contrary to his instructions to receive the same therefor; that said Connell refused to pay fare (otherwise than by surrender of said coupon) and was thereupon informed by said conductor that he (said Connell) would have to leave the train, and the said conductor thereupon stopped the said train at Tacony, a regular station on said line, and when the train was then and there stopped the conductor asked the said Connell to pay fare or to get off said train; that said Connell thereupon refused to pay fare (other than by the surrender of said coupon) and refused also to get off said train; that said conductor thereupon, without unnecessary force, expelled the said Connell from said train and proceeded on to New York, leaving the said Connell at Tacony aforesaid.

That said Connell afterwards brought a suit at law against your petitioner, first in the United States circuit court for the southern district of New York and afterwards, on January 19, 1882, in the superior court of Cook county, Illinois, wherein the said Connell claimed damages to the amount of $15,000 as resulting from his expulsion aforesaid; that summons was duly served on your petitioner, who, to save default, caused its appearance to be entered and a plea of the general issue to be filed therein; that on May 29, 1882, your petitioner caused the said Wabash, St. Louis and Pacific Railway Company to be informed in writing of the fact of the commencement of said suit and of your petitioner's intention to
122 look to said company for reimbursement of any amounts which your petitioner might be compelled to pay as damages

or otherwise in consequence of the sale of said ticket to said Connell, and the said Wabash, St. Louis and Pacific Railway Company was therein and thereby invited to join your petitioner in conducting the defense of said cause.

A copy of which said writing is hereto attached, marked Exhibit A, and made a part of this petition.

That said suit came on for trial at the May term of said superior court, 1882, before the Hon. Elliott Anthony, one of the judges of said court, and a jury; that your petitioner, in the absence of any appearance by the said Wabash, St. Louis and Pacific Railway Company and in the absence of any request to the contrary, caused the attendance of counsel and likewise the attendance of witnesses at said trail, and therein and thereby interposed such defense as seemed to your petitioner to be just and proper; that said trail, after many days' duration, resulted in a verdict against your petitioner for $15,000; that a motion for a new trail was thereupon entered on behalf of your petitioner and subsequently argued at length by both sides; whereupon the court allowed said motion and set aside said verdict.

That afterwards and at the May term of said superior court, 1883, said cause came on for a second trial and was tried before the Hon. J. E. Gary, also one of the judges of said court, and a jury; that upon said trial, as upon the preceding one, your petitioner, in the absence of any appearance by the said Wabash, St. Louis and Pacific Railway Company and in the absence of any direction to the contrary, caused the attendance of counsel and likewise the
123 attendance of witnesses at said trial, and, as before, therein and thereby interposed such defense as to your petitioner seemed just and proper; that said second trial, after many days' duration, resulted, as before, in a verdict against your petitioner for the sum of $15,000; a motion for a new trail was thereupon entered on behalf of your petitioner and was fully argued by counsel on both sides; that said motion was overruled and judgment was entered on said verdict; that your petitioner, on the advice of counsel, caused an appeal to be prayed and perfected from said judgment to the appellate court of said State, and before the said last-named tribunal obtained by oral and printed argument a review of the evidence and an examination into the law applicable thereto; that said appellate court, upon consideration, affirmed said judgment February 12, 1884, with costs.

That your petitioner, upon the advice of counsel, caused an appeal to be taken and perfected from the judgment of said appellate court to the supreme court of the State of Illinois, and by oral and printed argument obtained a review of the law applicable to said cause.

That said supreme court, upon consideration, reversed the said judgment of the appellate court and remanded said cause May 18, 1884, and thereupon filed an opinion expressing reasons for such reversal; that afterwards and on or about May 29, 1884, your petitioner was served with notice of an intention on the part of said Connell to apply for a rehearing; that such a petition was presented

to said supreme court by said Connell, but the same was denied by said court. Said supreme court, however, modified
124 the opinion previously filed in said cause, a copy of which opinion, as modified, is hereto appended, marked Exhibit B, and made a part of this petition.

That said Connell has given notice of an intention on his part to have said cause redocketed in the superior court for further proceedings, and your petitioner believes and charges the fact to be that it is the intention of said Connell to bring said cause to another trial.

Your petitioner further shows unto the court that said Wabash, St. Louis and Pacific Railway Company has not as yet appeared and taken any part in the defense of said cause or made any suggestions with reference thereto or paid anything toward the expenses thereof; that in the defense of said cause, as aforesaid, your petitioner has incurred expenses to a large amount for legal services and for the attendance of witnesses and has advanced large sums of money with which to pay necessary costs, and the time of its officers and employés has been taken up and occupied in making the necessary defense to said suit, all to the injury and damage of your petitioner in a large sum, to wit, in the sum of $6,000.

Your petitioner therefore prays that it may be allowed to file this petition in the cause above entitled, and that a rule may be entered requiring the receivers herein within a specified time to show cause, if any they have, why an order should not be entered herein for payment by them of the reasonable costs and expenses which your petitioner has incurred as aforesaid, together with all the proxi-
125 mate damages which your petitioner has suffered by reason of the aforesaid neglect or refusal on the part of the said Wabash, St. Louis and Pacific Railway Company to obey your petitioner's request to discontinue the sale of coupon tickets, and that this petition may be referred to a master of this court to determine the amount of such reasonable costs and expenses and proximate damages, and that your petitioner may have such other and further relief in the premises as justice and equity may warrant and to your honors shall seem meet.

And your petitioner will ever pray.

PENNSYLVANIA RAILROAD COMPANY,
By WILLARD & DRIGGS, *Its Attorneys-in-fact.*

WILLARD & DRIGGS,
Solicitors for Petitioner.

STATE OF ILLINOIS, }
Cook County, } *ss:*

George Willard, being duly sworn, says he is an attorney-at-law for the above-named Pennsylvania Railroad Company; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

GEORGE WILLARD.

Subscribed and sworn to before me this 3rd day of January, 1885.

FRANK L. DOUGLAS,
Notary Public. [SEAL.]

126 EXHIBIT A.

PHILADELPHIA, *May 13th*, 1882.

To the Wabash, St. Louis and Pacific Railway Co.:

W. J. Connell has brought suit against the Pennsylvania Railroad Company in the superior court, Cook county, Illinois, February term, 1882, to recover damages from the said company in the sum of $15,000 for an alleged breach of contract for declining to accept from him December 16th, 1880, in payment of passage fare from Philadelphia to New York, a ticket alleged to have been sold to him at Omaha, December 7th, 1880, by Frank E. Moores, agent, reading via Wabash, St. Louis and Pacific R'y, Baltimore and Ohio R. R., and Pennsylvania R. R., Council Bluffs to New York form O. 145; No. 5.

As under the notice given by the Pennsylvania Railroad Company to the Wabash, St. Louis and Pacific railroad, December 2d, 1880, the latter had no authority whatever to sell the ticket referred to, the Pennsylvania Railroad Company will look to the Wabash, St. Louis and Pacific Railway Company for reimbursement of any amounts the former may be compelled to pay as damages or otherwise in consequence of the sale of such ticket to said Connell, as alleged.

Having this interest in the suit, your company will probably desire to join the Pennsylvania Railroad Company in conducting the defense, and you are hereby invited to do so.

JOHN SCOTT,
General Solicitor.

Service of the foregoing notice accepted this 29th day of May, 1882.

WELLS H. BLODGETT,
Gen. Solicitor W., St. L. & P. R'y Co.

127 EXHIBIT B.

Opinion by CRAIG, *J.*:

This was an action by Wm. J. Connell in the superior court of Cook county against the Pennsylvania Railroad Company to recover damages for a forcible expulsion from appellant's car at Tacony, a station a few miles east of West Philadelphia, on the 16th day of December, 1880. On a trial of the cause before a jury the plaintiff recovered a verdict and judgment for $15,000, which was affirmed in the appellate court. It appears from the evidence introduced on the trial that the Wabash, St. Louis and Pacific Railway Company operated a line of railroad from Omaha to St. Louis, and that appellant operated a line of road from Philadelphia to New York. The Wabash Railroad Company had for several years

been in the habit of selling coupon tickets to passengers from Omaha to New York over its own line and the lines of the Ohio & Mississippi, the Marietta & Cincinnati, the Baltimore & Ohio, the Philadelphia, Wilmington & Baltimore, and appellant's line. On the 1st day of December, 1880, appellant sent the Wabash Company a message by telegraph as follows:

"DECEMBER 1ST, 1880.

George H. Daniels, Wabash, St. Louis and Pacific railway, St. Louis, Missouri:

On receipt hereof please discontinue sale of tickets to all points north and east of Philadelphia, reading via Baltimore & Ohio railroad and this line. Please answer.

L. P. FARMER."

The Wabash Company received the message and replied as follows:

"Tickets reading via Baltimore and Ohio to all points east and north of Philadelphia have been ordered off sale."

128 The Wabash notified the Baltimore & Ohio road of the action of appellant, and in reply they received the following:

"BALTIMORE, MD., *Dec.* 2, 1880.

"To Geo. H. Daniels, Wabash R'y, St. L.:

"Please get up quickly tickets. New York, and points East by B. & O. and Boundbrook route, trains run Chicago & Cin'ti N. Y. without change. Coupons should read Balto., Phila., Boundbrook R. R. Phila., and Reading R, R, Phila., & Boundbrook Centr'l R. R. New Jersey, Boundbrook N. Y. Until you get them on continue sales Penn. R. R. tickets by B. & O., reporting entire proportion east Baltimore to B. & O. We are exchanging and will protect, answer.

"L. M. COLE."

On the 7th day of December, 1880, the Wabash Company, at Omaha, sold appellee, who had no notice of the action of appellant, a coupon ticket from Omaha to New York, reading via Baltimore & Ohio and appellant's line, for the sum of $38.05, which was paid. Appellee left Omaha on the 7th day of December; arrived at Washington on the 9th. He remained there a few days; then resumed his journey; reached Philadelphia on the 16th, where he took passage on appellant's cars for New York. When the conductor came into the car in which appellee had taken passage his ticket purchased at Omaha was presented and refused. The conductor notified appellee that the ticket was not good on that road and demanded fare, which appellee refused to pay.

The train was stopped at Tacony, a regular station, and appellee requested to leave the train, which he refused to do. The conductor then put him off, using such force as seemed necessary for

129 that purpose. Several questions were raised in regard to the ruling of the court on the admission of evidence, but as they

are of minor importance we will not consume time in their discussion, but will proceed to the main points in the case, which are presented by the decision of the court in the instructions to the jury.

It is insisted by appellant that the Wabash Company, in the sale of the through ticket from Omaha to New York, contracted as a principal and not as an agent with appellee to carry him over appellant's line from Philadelphia to New York, and that the refusal of appellant to accept appellee's ticket was merely a refusal to act as agent of the Wabash Company, and that a suit by a third person does not lie against an agent for the reason the agent refuses to act for the principal. The court refused the instructions of appellant presenting this view of the law, and gave instructions for appellee presenting the view that in the sale of the through ticket the Wabash Company acted as agent of appellant. The ticket, upon its face, gives no sanction to appellant's position. It says: "In selling this ticket for passage over other roads this company acts only as agent for them and assumes no responsibility beyond its own line." The coupon over appellant's line declared: "Issued by the Wabash, St. Louis and Pacific railway on account of Pennsylvana railroad." From these statements upon the ticket and coupon purchased by appellee, which was the contract between the parties and showed their intentions, it is manifest that the Wabash Company, by its contract with appellee, only assumed to act as agent in the sale of tickets over the connecting lines and intended to assume the responsibility of an agent and none other, but aside from the
130 language of the ticket we think the law on this subject is well settled. We think the rule is well stated by Redfield. He says:

"As the general duty of common carriers of passengers is different from the common carriers of goods, so the implied contract resulting from the sale of through tickets for passengers is different. In the case of the carriers of goods and the baggage of passengers we have seen that taking the pay and giving tickets or checks through binds the first company ordinarily for the entire route.

"But in regard to carrying passengers the rule is different. We apprehend these through tickets in the form of coupons, which are purchased of the first company and which entitle the person holding them to pass over successive roads with ordinary passenger baggage, sometimes for thousands of miles in this country, import commonly no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned."

2d vol. Redfield on the Law of Railways, sec. 201.

The same rule is announced in Harlan *v.* Eastern Railroad Co., 114 Mass., 44, and in Pennsylvania Railroad Co. *v.* Schwarzenberger, 45 Pa. State, 208. The same principle was announced by this court in Chi., R. I. & P. R. R. Co. *v.* Fahey, 52 Ill., 81. It is true a company selling a through ticket might by contract bind itself to be responsi-

ble for the entire route, but such liability cannot arise nor can it be established from the fact alone that a through ticket has been sold. Something more is required to create a liability of such a character.

131 Several decisions of this court have been cited by appellant to the effect that where a carrier receives goods marked for shipment to a particular place beyond the line of a carrier, in the absence of an express contract binding the carrier, the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked, and in such case where loss occurs the carrier receiving the goods is liable to the shipper. Actions for loss of freight are entirely different from an action of this character and the cases which control the one do not control the other. Where a coupon ticket has been sold as here the rights of the passenger and the duty and responsibility of the several companies over which the passenger has procured a passage are the same as they would have been if the passenger had purchased a ticket at the office of each company constituting the through line. Note vol. 2, Redfield American R. Cases, 465. If we are correct in this position, the instructions of the court on this branch of the case are not erroneous. But the instructions in regard to the measure of damages present a more serious question. In regard to the damages, the court in substance directed the jury that the plaintiff was entitled to recover compensation for loss of time or actual pecuniary loss as the result of being forcibly ejected from the train; also such sum as will compensate for injuries to the person resulting from being forcibly ejected from the train and for bodily pain.

The conductor had been ordered by his superior not to receive a ticket for fare over the road like the one presented by appellee, and

132 when in the discharge of his duty as conductor he called upon appellee for fare and the ticket was presented he notified appellee that he could not receive the ticket and at the same time informed him that he must pay fare to New York. This appellee refused to do and then the conductor notified him that he must pay the regular fare or leave the train. Appellee refused to pay or leave the car and the conductor stopped the train at a regular station and put appellee off by force, but it does not appear that more force was used than was necessary. This was in substance the transaction. Conceding that appellee by virtue of his ticket was entitled to be carried over appellant's road, the question presented is whether he can recover damages for being forcibly expelled from the train or was it his duty when notified by the conductor that he would not receive the ticket to pay his fare under protest or leave the train and hold the company responsible for the expulsion without compelling the conductor to resort to force. Had appellee paid the fare demanded he could have sued the company and recovered for a breach of contract. Had he left the train when the conductor refused to receive the ticket and ordered him to leave he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train. But can he recover for the force used by the conductor which he by his own act

induced the conductor to resort to in order to put him off the train?

A question similar in principle to the one involved in this case arose in C., B. & Q. R. R. Co. *v.* Griffin, 68 Ill., 499, and it was there held if a passenger pays his fare to a certain station and the ticket agent inadvertently gives him a ticket to an intermediate
133 station the demand of a fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying on such demand his action will be as complete as if he resists the demand and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable reparation for the indignity he can maintain his appropriate action.

In Pullman Palace Car Co. *v.* Reed, 75 Ill., 125, Reed had purchased a ticket for a particular berth in a sleeping car, and had lost it after entering the car. He refused to pay a second time and was forcibly expelled, after producing his proof that he had purchased a ticket for a berth.

A verdict for $3,000 was held to be excessive, and it was also held that the plaintiff was only entitled to recover the price paid for the ticket and reasonable compensation for the trouble and inconvenience he suffered by being deprived of a berth in the sleeping car. See also Hall *vs.* Memphis & Charleston R. R. Co., 9 American and English Railroad Cases, 349.

In the case first cited it was expressly held by this court that where the passenger paid on the demand of the conductor his action will be as complete as if he resists and suffers himself to be ejected, and his ejectment in such case will add nothing to his cause of action. We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover
134 such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train.

But we perceive no ground upon which he can recover for personal injuries received unless the expulsion was malicious or wanton. When the conductor demanded that he should pay fare or leave the train he would have been justified in refusing to pay fare and in leaving the train on the command of the conductor, and had he done so he would have received no personal injuries and might have brought his action and recovered as before stated, but when he refused to leave the train and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself. The conductor was ordered by his superior not to receive a ticket like the one presented; this order he was bound to obey, and so far as appears he acted in good faith; and when appellee was notified by the conductor that his ticket was not good and would not be received it was his duty to leave the train in a peaceable manner and hold the company responsible for the

consequences rather than resist or undertake to retain his place on the train by force. A train crowded with passengers, often women and children, is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed or the passenger should in a peaceable manner leave the train and seek redress in the courts, where he will find a
135 complete remedy for every indignity offered and for all damages sustained.

The instructions in reference to damages we regard erroneous, and for this error the judgment will be reversed and the cause remanded.

(Endorsed:) Filed Jan'y 12, 1885. Wm. H. Bradley, clerk.

136 Afterward, to wit, on the twenty-first day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Now comes John Murtogh, by W. R. Chamberlain, and moves the court for leave to garnishee the receivers heretofore appointed in this case for the amount due one Robert Blaney, who, it is alleged, is an employee of said receivers, and against whom said Murtogh has recovered a judgment before Charles Arnd, Esq., a justice of the peace of Cook county, in this district, and the court having fully considered said application doth overrule the same.

Afterward, to wit, on the 27th day of January, 1885, came Solon Humphreys and Thomas E. Tutt, receivers, by their solicitors, and filed in said clerk's office their answer to the intervening petition of the Pennsylvania Railroad Company in said entitled cause; which said answer is in the words and figures following, to wit:

137 Circuit Court of the United States, N. Dist. of Ills.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants. } In Chancery.

Bill for Receivership, etc.

The answer of Solon Humphreys and Thomas E. Tutt, receivers of the complainant in the above cause, to the intervening petition of

the Pennsylvania Railroad Company therein respectfully shows that they have no knowledge of the matters and things set forth in said petition except from the statements therein contained, and hence do neither admit nor deny them, but will insist on strict proof thereof.

But they say and show to this court that it appears on the face of said petition that the supposed cause of action on the part of the said Pennsylvania Railroad Company against the said Wabash, St. Louis and Pacific Railway Company arose out of the alleged unauthorized sale by the last-named company of a coupon ticket for a passage from Omaha to New York over the line of railroad between Philadelphia and New York, operated by said intervening petitioner, and that if any cause of action on the part of such petitioner growing out of the sale of such ticket ever existed against the said Wabash, St. Louis and Pacific Railway Company it arose more than a year before the filing of the original bill in this cause and the appointment of receivers thereunder and could in no manner be allowed or construed to be a claim entitled to any priority of
138 payment over the other general floating and unsecured indebtedness of said Wabash, St. Louis and Pacific Railway Company existing more than six months prior to the existing receivership under the original bill in this cause.

But these receivers further deny that the said Pennsylvania Railroad Company ever had any ground of action whatever against the said Wabash, St. Louis and Pacific Railway Company growing out of the sale of said ticket, but, on the contrary, if the sale of said ticket by such last-named company was unauthorized the said W. J. Connell alone had a cause of action against it on account of such attempted sale and the refusal of said Pennsylvania Railroad Company to honor such ticket and if said last-named company rightfully rejected such ticket, said Connell had no cause of action for his expulsion from its train under the circumstances referred to in said petition, and said Wabash, St. Louis and Pacific Railway Company could not be made liable for the expenses attendant upon an unfounded action brought by said Connell against said Pennsylvania Railroad Company, and, on the other hand, if said Pennsylvania Railway Company was not justified in rejecting said ticket and in expelling said Connell from its train, then it should bear the consequences of its own illegal act.

Your petitioners therefore pray that the rule entered upon the said petition may be discharged and the petitioner held to be entitled to no relief thereunder.

SOLON HUMPHREYS & THOMAS E. TUTT,
Receivers of the Wabash, St. Louis & Pacific Railway Company,
By SLEEPER & WHITON, *Sols.*

(Endorsed:) Filed Jan'y 27, 1885. Wm. H. Bradley, clerk.

139 Afterward, to wit, on the thirtieth day of January, 1885, in the December term of said court, 1884, in the record of the

proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

On motion, leave is hereby given James Mullen to file an intervening petition herein, and the receivers in this cause are hereby ruled to answer said petition on or before the sixteenth day of February next, and that service be made upon the solicitors of said receivers.

140 Afterward, to wit, on the third day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

In the matter of the intervening petition of H. L. Shelly, R. D. Shelly, and Albert C. Wilde.

On motion of Daniel H. Paddock, solicitor for said petitioners, leave is hereby given them to file their intervening petition herein, which is done; and thereupon the receivers herein are hereby ordered to show cause, in twenty days from service of this rule upon them, why the claims of said petitioners should not be paid, and that service of this rule be made upon Wells H. Blodgett, solicitor of said receivers, by sending a certified copy of the same by mail to him at St. Louis, Missouri.

141 Afterward, to wit, on the fourteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

On motion of George Willard, Esq., it is ordered that the intervening petition of the Pennsylvania Railroad Company filed herein

be, and the same is hereby, referred to J. I. Bennett, master in chancery, to ascertain and report the amount paid by said intervening petitioner in the matter of the defense of the suit referred to in said petition.

142 On the same day, to wit, on the fourteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said-entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

In the matter of the application of Philip Henry Brown and John Paton.

On reading and filing the petition of Philip Henry Brown and John Paton, on motion of Foster & Thomson, solicitors for the petitioners, the solicitors of the receivers of the Wabash, St. Louis and Pacific Railway Company consenting thereto, it is ordered that the said receivers show cause in ten days why the said Philip Henry Brown and John Paton should not have leave to commence an action in this court against Solon Humphreys and Thomas E. Tutt as receivers of the Wabash, St. Louis and Pacific Railway Company for the foreclosure of the mortgage or deed of trust executed to said petitioners and Robert C. Martin by the Toledo, Peoria and Western Railroad Company, in said petition described, and for such other and further relief as they may deem proper.

143 Afterward, to wit, on the twenty fifth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said-entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Now come the receivers in this cause, by Messrs. Sleeper and Whiton, their solicitors, and also come the petitioners, R. D. Shelly, H. L. Shelly, and Albert C. Wilde, by Mr. D. H. Paddock, their solicitor, and the court, being now fully advised as to the merits of the claims set out by and in behalf of said petitioners in their petition filed herein, doth find that there is due and should be paid to said R. D. Shelly the sum of four hundred and thirty-nine dollars and fifty cents, to said H. L. Shelly the sum of three hundred and

seventy-one dollars and fifty-four cents, and to said Albert C. Wilde the sum of one hundred and seventy-nine dollars and thirty-five cents for fences built by said petitioners respectively, as set forth in their said petition, and that said amounts are a proper
144 lien and charge upon the property of said railway company in the hands of said receivers, and should be paid out of the earnings of said railway now or hereafter to come to their hands.

It is therefore ordered that said receivers pay to said respective petitioners or to D. H. Paddock, their solicitor, the several sums so found due them respectively, and that on such payment said petitioners or their said solicitor release and discharge the judgments by them recovered for said fences in the circuit court of Kankakee county, in the State of Illinois, against said railway company.

145 Afterward, to wit, on the twenty-sixth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

In the matter of the application of Philip Henry Brown and John Paton.

An order having been made on the fourteenth day of February, 1885, herein, upon the consent of the solicitors for said receivers, directing the receivers of the Wabash, St. Louis & Pacific Railway Company to show cause within ten days why the above-named petitioners, Philip Henry Brown and John Paton, should not have leave to commence an action in this court against Solon Humphreys and Thomas E. Tutt, receivers of the said Wabash, St. Louis and Pacific Railway Company, for the foreclosure of the mortgage or deed of trust executed to said petitioners and Robert C. Martin by the Toledo, Peoria & Western Railroad Company, and for such other and further relief as they may deem proper, and more
146 than ten days having elapsed since the granting of said order and no cause having been shown by said receivers against granting such leave, on reading and filing the said order to show cause and the petition of Philip Henry Brown and John Paton, on which said order was made, and on motion of Foster & Thomson, solicitors for said petitioners, it is ordered that said Philip Henry Brown and John Paton have leave to commence an action in this court against the said Solon Humphreys and Thomas E. Tutt, receivers of the said Wabash, St. Louis and Pacific Railway Company, for the foreclosure of the mortgage or deed of trust executed to said Philip Henry Brown and John Paton and to Robert C. Martin by the Toledo, Peoria and Western Railroad Company.

147 Afterward, to wit, on the third day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

On reading and filing the intervening petition of William Robbins in the above-entitled cause, praying that he be allowed the amount of a judgment recovered in the circuit court of Kankakee county, in the State of Illinois, against "the Wabash, St. Louis and Pacific Railway Company," at the September term of said court, A. D. 1884, for the sum of five hundred and ninety dollars, as stated in the said petition, and on motion of counsel for said petitioner ordered that Solon Humphreys and Thomas E. Tutt, the receivers appointed in this case, show cause before this court, on the first Monday of April next, why the prayer of said petitioner should not be granted, and that a copy of this order be served upon Wells H. Blodgett, the general solicitor of said receivers, at St. Louis,
148 Missouri, on or before the seventh instant, by mail.

Afterward, to wit, on the eighteenth day of March, 1885, came John I. Bennett, one of the masters in chancery of said court, and filed in said clerk's office his report in said entitled cause; which said report is in the words and figures following, to wit:

149 *Master's Report.*

Circuit Court of the United States, Northern District of Illinois.

THE WABASH, ST. LOUIS AND PACIFIC RAILROAD COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK, PENNSYLVANIA RAILROAD COMPANY Interpleading.
} In Chancery.

In the matter of the intervening petition of the Pennsylvania Railroad Company filed in the above-entitled cause.

To the Hon. W. Q. Gresham, judge, &c.:

I, John I. Bennett, master in chancery of said court, respectfully report that, in pursuance of an order of reference in the matter involved in said petition to me to take evidence thereon and report the same, together with my findings, the parties appeared before me on the 13th day of March, A. D. 1885; that the petitioner was attended by George Willard, a witness on its behalf; whereupon

the oral evidence of said witness was taken by me and is hereto annexed, and the documentary evidence, also annexed to this
150 report and, together with the said evidence of said Willard, hereby made a part thereof, *were* introduced in the above matter. No evidence was offered on the part of the defendant.

From the evidence it appears and I find that the petitioner has paid and expended in and about the defence of the suit described and set forth in the evidence the sum of $577.50, exclusive of payments on account of the services of Willard & Driggs, as attorneys in the matter referred to, and has also paid them on their fees in said case $1,500; that the balance of their said fees, which are charged to the petitioner, but are as yet unpaid, is $500, and that the reasonable value of the attorneys' fees of the said Willard & Driggs as paid and charged by them, as above stated, for the services by them performed in and about said suit is $2,000, making the total amount of the petitioner's claim for which it is entitled to be reimbursed and paid the sum of $2,577.50, in case the court shall find as matter of law that the defendant is liable.

All of which is respectfully submitted.

JOHN I. BENNETT,
Master in Chancery of the United States Circuit Court,
Northern District of Illinois.

Master's fees for evidence & report, $15; paid by Willard & Driggs, for petitioner.

151 UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the Circuit Court Thereof.

WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY }
vs. }
CENTRAL TRUST COMPANY OF NEW YORK, PENNSYLVANIA RAILROAD COMPANY Interpleading. }

To Sleeper & Whiton, attorneys for the said W., St. L. & P. R. R. Co.:

Please take notice that we shall, before J. L. Bennett, master in chancery, proceed with the evidence in the above-entitled cause tomorrow, Friday, March 13th, 1885, at 10 o'clock a. m. or as soon thereafter as counsel can be heard.

WILLARD & DRIGGS,
Att'ys for Penn. R. R. Co.

Chicago, March 12, 1885.

Service of the within notice accepted this 17th day of March, A. D. 1885.

SLEEPER & WHITON.

152 Circuit Court of the United States, Northern District of Illinois.

THE WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK, PENNSYLVANIA RAILROAD COMPANY Interpleading. } In Chancery.

Parties met, pursuant to notice, Friday, March 13th, 1885, 11 o'clock a. m.

Present: H. K. Whiton, Esq., of counsel for the complainant, and George Willard, Esq., of counsel for the intervening petitioner.

And the said GEORGE WILLARD, a witness on behalf of the defendant, being first duly sworn, testified as follows, to wit:

I offer in evidence on behalf of the petitioner a certified copy of the opinion of the supreme court delivered in the said case of Connell against The Pennsylvania Railroad Company, marked "Exhibit A." I also offer in evidence the original notice to the Wabash of the pendency of the suit, marked "Exhibit B."

In regard to the costs and expenses of the defendant, The Pennsylvania Railroad Company, in defending the suit up to the time of filing this intervening petition, I am able to state, of my own knowledge, the following items as having been paid:

Expenses of Mr. Driggs to Omaha and St. Louis attending the taking of depositions on behalf of the plaintiff Connell	$21 25
Amount paid Charles T. Brown, stenographer, for reporting first and second trials of the case	138 25
Bill of Dr. R. N. Isham for professional services, examining the plaintiff Connell and testifying thereto on the second trial of the case	50 00
Costs paid J. J. Healy, clerk superior court, for record on appeal to the appellate court	85 00
Costs paid Beach, Barnard & Company, printing abstracts and briefs	223 00
Costs paid commissioners for taking deposition of Mr. Brooks, of New York, witness on behalf of defendant	30 00
Costs paid commissioners for taking deposition of Conductor Wilson and his assistant, Uberoth, on behalf of the defendant	30 00

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Willard & Driggs' charges for services in the case as attorneys for the defendant amount to the sum of $2,000.

In regard to the services performed by the attorneys, I will say that Mr. Driggs spent five days in Omaha and St. Louis attending on the taking of the depositions on behalf of the plaintiff; we spent three days in making preparation for the first trial of the case, and we were three days in court on the first trial; we spent one day in arguing the motion for new trial; we spent one day preparing for

the second trial of the case; we spent four days in court on the second trial of the case; we spent one day in arguing the motion for new trial; we prepared a brief for the appellate court on appeal from the judgment of the superior court, and we argued the case orally in the appellate court; we prepared a brief and the reply brief in the supreme court and argued the case orally in the supreme court; three days was spent in attendance at the supreme court on this argument; we prepared the record on appeal from the superior court and on appeal from the appellate court,
154 the cor-espondence with the defendant, and the reports to it of the progress of the case since the beginning of the suit in January, 1882, has been very large.

I am acquainted with the usual rates charged by attorneys for similar services in this city, and believe that $2,500 for the services rendered would be a reasonable charge. Our charges, however, to the defendant, The Pennsylvania Railroad Company, aggregate the sum of $2,000, $1,500 of which has been paid; the balance remains unpaid.

Cross-examination by Mr. WHITON:

Q. In your statement of the value of legal services rendered in the Connell suit, do you give what you think to be a fair charge for the services, or do you give what you have actually charged and been paid for?

A. I give what has actually been charged and paid for, with the exception of the last bill of $500 which has not yet been paid and which forms a part of the $2,000 total charge.

Q. Is it not true that Willard & Driggs are employed by the Pennsylvania Railroad Company upon an annual salary?

A. No, sir.

Q. You have no special arrangement for doing their work, you charge by the case?

A. Yes, sir; by the case. No part of the costs thus paid by the Pennsylvania Railroad Company have been repaid to it.

Q. What attempt have you made to collect?

A. We have made no attempt to collect.

The cause has been redocketed and is now pending and undetermined in the superior court.

155 EXHIBIT A.

STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa, on Tuesday, the 4th day of March, in the year of our Lord one thousand eight hundred and eighty-four, within and for the northern grand division of the State of Illinois.

Present: Hon. Benj. R. Sheldon, chief justice; Pinkney H. Walker, justice; Jno. Schofield, justice; T. Lyle Dickey, justice;

John H. Mulkey, justice; John M. Scott, justice; Alfred M. Craig, justice; James McCartney, attorney general; W. R. Milligan, sheriff; Everell F. Dutton, clerk.

Be it remembered that afterwards, to wit, on the 19th day of May, A. D. 1884, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

THE PENNSYLVANIA RAILROAD COMPANY *vs.* WILLIAM J. CONNELL. } No. 77. Error to Appeal from 1st District.

Opinion by CRAIG, *J.*:

This was an action brought by Wm. J. Connell in the superior court of Cook county against the Pennsylvania Railroad Company to recover damages for forcible expulsion from appellant's car at
Tacony, a station a few miles east of West Philadelphia, on
156 the 16th day of December, 1880. On a trial of the cause before a jury the plaintiff recovered a verdict and judgment for $15,000, which was affirmed in the appellate court. It appears from the evidence introduced on the trial that the Wabash, St. Louis and Pacific Railway Company operated a line of railroad from Omaha to St. Louis, and that appellant operated a line of road from Philadelphia to New York. The Wabash Railroad Company had for several years been in the habit of selling coupon tickets to passengers from Omaha to New York over its line and the lines of the Ohio and Mississippi, the Marietta and Cincinnati, the Baltimore and Ohio, the Philadelphia, Wilmington and Baltimore, and appellant's line.

On the 1st day of December, 1880, appellant sent the Wabash Company a message by telegraph as follows:

DECEMBER 1ST, 1880.

George H. Daniels, Wabash, St. Louis and Pacific railway, St. Louis, Missouri:

On receipt hereof please discontinue sale of tickets to all points north and east of Philadelphia, reading via, Baltimore & Ohio railroad and this line. Please answer.

L. P. FARMER.

The Wabash Company received the message and replied as follows:

"Tickets reading via Baltimore and Ohio railroad to all points east and north of Philadelphia have been ordered off sale."

The Wabash notified the Baltimore and Ohio road of the action of appellant, and in reply received the following:

"BALTIMORE, MD., *Dec.* 2, 1880.

"To George H. Daniels, Wabash R'y, St. L.:

157 "Please get up quickly tickets New York and points east by B. & O. and Boundbrook route. Trains run Chicago &

Cin'ti, N. Y. without change Coupons should read Balto. Phila. Boundbrook R. R. Phila., and Reading R., R. Phila. & Boundbrook Central R. R. New Jersey, Boundbrook N. Y. Until you get them on continue sales Penn. R. R. tickets by B. & O. reporting entire proportion east Baltimore to B. & O. We are exchanging and will protect, answer.

"L. M. COLE."

On the 7th day of December, 1880, the Wabash Company at Omaha sold appellee, who had no notice of the action of appellant, a coupon ticket from Omaha to New York, reading via Baltimore and Ohio and appellant's line, for the sum of $38.05, which was paid.

Appellee left Omaha on the 7th day of December; arrived at Washington on the 9th. He remained a few days and then resumed his journey; reached Philadelphia on the 16th, where he took passage on appellant's cars for New York. When the conductor came into the car in which appellee had taken passage his ticket purchased at Omaha was presented and refused. The conductor notified appellee that the ticket was not good on that road and demanded fare, which appellee refused to pay. The train was stopped at Tacony, a regular station, and appellee requested to leave the train, which he refused to do. The conductor then put him off, using such force as seemed necessary for that purpose. Several questions were raised in regard to the ruling of the court on the admission of evidence, but as they are of minor importance we will not consume time in their discussion, but will proceed to the main points in the case, which are presented by the decision of the court on the instructions to the jury.

158 It is insisted by appellant that the Wabash Company, in the sale of the through ticket from Omaha to New York, contracted as a principal and not as an agent with appellee to carry him over appellant's line from Philadelphia to New York, and that the refusal of appellant to accept appellee's ticket was merely a refusal to act as agent of the Wabash Company, and that a suit by a third person does not lie against an agent for the reason the agent refused to act for the principal. The court refused the instructions of appellant presenting this view of the law and gave instructions for appellee, presenting the view that in the sale of the through ticket the Wabash Company acted as agent of appellant. The ticket upon its face gives no sanction to appellant's position. It says, "In selling this ticket for passage over other roads this company acts only as agent for them and assumes no responsibility beyond its own line."

The coupon over appellant's line declared, "Issued by the Wabash, St. Louis and Pacific railway on account of Pennsylvania railroad." From those statements upon the ticket and coupon purchased by appellee, which was the contract between the parties and showed their intentions, it is manifest that the Wabash Company, by its contract with appellee, only assumed to act as agent in

the sale of tickets over the connecting lines and intended to assume the responsibility of an agent and none other.

But, aside from the language of the ticket, we think the law on this subject is well settled. We think the rule is well stated by Redfield. He says:

159 "As the general duty of common carriers of passengers is different from the common carriers of goods, so the implied contract resulting from the sale of through tickets for passengers is different. In the case of the carriers of goods and the baggage of passengers we have seen that taking the pay and giving tickets or checks through binds the first company ordinarily for the entire route. But in regard to carrying passengers the rule is different, we apprehend. These through tickets in the form of coupons, which are purchased of the first company and which entitle the person holding them to pass over successive roads with ordinary passenger baggage sometimes for thousands of miles in this country, import commonly no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned."

2nd vol. Redfield on the Law of Railways, sec 201.

The same rule is announced in Harlan *vs.* Eastern Railroad Co., 114 Mass., 44, and in Pennsylvania Railroad Co. *vs.* Schwarzenberger, 45 Pa. State, 208. The same principle was announced by this court in Chi., R. I. & P. R. R. Co *vs.* Fahey, 52 Ill., 81. It is true a company selling a through ticket might by contract bind itself to be responsible for the entire route, but such liability cannot arise, nor can it be established from the fact alone that a through ticket has been sold. Something more is required to create a liability of such a character. Several cases, decisions of this court, have been cited by appellant to the effect that where a carrier receives goods marked for shipment to a particular place beyond the line of a carrier

160 in the absence of an express contract binding the liability the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked, and in such case where loss occurs the carrier receiving the goods is liable to the shipper. Actions for loss of freight are entirely different from an action of this character, and the cases which control the one do not control the other. Where a coupon ticket has been sold, as here, the rights of the passenger and the duty and responsibility of the several companies over which the passenger has procured a passage are the same as they would have been if the passenger had purchased a ticket at the office of each company constituting the through line. Note vol. 2 Redfield American R. Cases, 465. If we are correct in this position the instructions of the court on this branch of the case are not erroneous. But the instructions in regard to the measure of damages present a more serious question. In regard to the damages the court in substance directed the jury that the plaintiff was entitled to recover compensation for

loss of time or actual pecuniary loss as the result of being forcibly ejected from the train; also such sum as will compensate for injuries to the person resulting from being forcibly ejected from the train and for bodily pain. The conductor had been ordered by his superiors not to receive a ticket for fare over the road like the one presented *be* appellee, and when in the discharge of his duty as conductor he called upon appellee for fare and the ticket was presented he notified appellee that he could not receive the ticket and at the same time informed him that he must pay fare to New York. This appellee refused to do, and then the conductor
161 notified him that he must pay the regular fare or leave the train.

Appellee refused to pay or leave the car and the conductor stopped the train at a regular station and put appellee off by force, but it does not appear that more force was used than was necessary. This was, in substance, the transaction. If it be true that appellee by virtue of his ticket was entitled to be carried over appellant's road the question presented is whether he can recover damages for being forcibly expelled from the train or was it his duty when notified by the conductor that he would not receive the ticket to pay his fare under protest or leave the train and hold the company responsible for the expulsion without compelling the conductor to resort to force. Had appellee paid the fare demanded he could have sued the company and recovered for a breach of the contract. Had he left the train when the conductor refused to receive the ticket and ordered him to leave he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train, but can he recover for the force used by the conductor which he by his own act induced the conductor to resort to in order to put him off the train?

A question similar in principle to the one involved in this case arose in C., B. & Q. R. R. Co. *vs.* Griffin, 68 Ill., 499, and it was then held if a passenger pays his fare to a certain station and the ticket agent inadvertently gives him a ticket to an intermediate station the demand of a fare — second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying on such demand his action will be as complete as if he resists the demand and suffers
162 himself to be ejected, and his ejection in such case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable reparation for the indignity he can maintain his appropriate action. In Pullman Palace Car Co. *vs.* Reed, 75 Ill., 125, Reed had purchased a ticket for a particular berth in a sleeping car and had lost it after entering the car. He refused to pay a second time and was forcibly expelled after producing proof that he had purchased a ticket for a berth.

A verdict for $3,000 was held to be excessive, and it was also held that the plaintiff was only entitled to recover the price paid for the ticket and reasonable compensation for the trouble and inconvenience he suffered by being deprived of a berth in the sleeping

car. See also Hall *vs.* Memphis & Charleston R. R. Co., 9 American and English Railroad Cases, 349.

In the case first cited it was expressly held by this court that where the passenger paid on the demand of the conductor his action will be as complete as if he resists and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York; he was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in
163 being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton. When the conductor demanded that appellee should pay fare or leave the train he would have been justified in refusing to pay fare and in leaving the train on the command of the conductor, and, had he done so, he would have received no personal injuries, and might then have brought his action and recovered as before stated, but when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntrrily brought upon himself.

The conductor was ordered by his superior not to receive a ticket like the one presented; this order he was bound to obey, and, so far as appears, he acted in good faith, and when appellee was notified by the conductor that his ticket was not good and would not be received it was his duty to leave the train in a peaceable manner and hold the company responsible for the consequences rather than resist or undertake to retain his place on the train by force.

164 A train crow-ed with passengers, oft-n women and children, is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed or the passenger should in a peaceable manner leave the train and seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained.

The instructions in reference to the damages we regard erroneous, and for this error the judgment will be reversed and the cause remanded.

Mulkey, J., dissents.

STATE OF ILLINOIS, }
Supreme Court, Northern Grand Division, } *ss:*

I, Everell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the

records and files thereof, do hereby certify that the foregoing is a true copy of the final opinion of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court at Ottawa, this 20th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] E. F. DUTTON,
Clerk of the Supreme Court.

165 EXHIBIT "B."

John Scott, general solicitor: Geo. W. I. Ball, chief conveyancer; James A. Logan, ass't gen'l solicitor.

Pennsylvania Railroad Company, legal department, 233 South Fourth street.

PHILADELPHIA, *May 13th*, 1882.

To the Wabash, St. Louis and Pacific Railway Co.:

W. J. Connell has brought suit against the Pennsylvania Railroad Company in the superior court Cook county, Illinois, February term, 1882, to recover damages from the said company in the sum of $15,000 for an alleged breach of contract for declining to accept from him December 16th, 1880, in payment of passage fare from Philadelphia to New York, a ticket alleged to have been sold to him at Omaha December 7th, 1880, by Frank E. Morris, agent, reading via Wabash, St. Louis and Pacific R'y, Baltimore and Ohio R. R., and Pennsylvania R. R., Council Bluffs to New York, for O 145, No. 5. As under the notice given by the Pennsylvania Railroad Company to the Wabash, St. Louis and Pacific Railroad Company December 2d, 1880, the latter had no authority whatever to sell the ticket referred to, the Pennsylvania Railroad Company will look to the Wabash, St. Louis and Pacific Railway Company for reimbursement of any amount the former may be compelled to pay as damages or otherwise in consequence of the sale of such ticket to said Connell as alleged. Having this interest in this suit, your company will probably desire to join the Pennsylvania Railroad Company in conducting the defence, and you are hereby invited to do so.

JOHN SCOTT,
General Solicitor.

166 Service of the foregoing notice accepted this 27th day of May, 1882.

WELLS H. BLODGETT,
Gen'l Solicitor W., St. L. & P. R'y Co.

(Endorsed:) Filed M'ch 18, 1885. Wm. H. Bradley, clerk.

167 Afterward, to wit, on the twenty-fifth day of March, in the adjourned March term of said court, 1885, in the record of

the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

On motion of Dent, Black and Cratty Brothers, leave is hereby given George Lockwood to file an intervening petition herein, with leave also to take depositions before Jacob H. Bass, a justice of the peace, at Canton, Illinois.

168 On the same day, to wit, on the twenty-fifth day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Intervening petition of the Pennsylvania Railroad Company.

Ordered that master's report herein be approved.

That the Baltimore and Ohio Railroad Company be summoned to appear herein, and that it show cause within ten days after service of a copy of this order upon it, if any it has, why it should not be required to pay to the receivers herein for the use of the petitioner, Pennsylvania Railroad Company, the sum of twenty-five hundred and seventy-seven dollars and fifty cents in satisfaction of the amount found by the master's said report, together with the costs of the said proceeding by petition, to be taxed.

169 Afterward, to wit, on the third day of August, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Now comes the Chicago and Eastern Illinois Railroad Company, by William Armstrong, its solicitor, and moves the court for leave to institute suit in favor of said company in this court against the said Wabash, St. Louis and Pacific Railway Company, Solon Hum-

phreys and Thomas E. Tutt, as receivers, and other parties; and the court, after considering said motion, hereby grants permission to institute such suit in this court. It is ordered and decreed by the court that the said receivers appear in said suit and defend the same, after receiving a certified copy of this order as well as a copy of the bill of complaint in this cause, which shall be deemed notice to them of such suit.

170 Afterward, to wit, on the twenty-second day of January, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK. } In Chancery.

In the matter of the petition of Philip Henry Brown, Robert C. Martin, and John Paton, trustees, for the delivery of certain property, etc.

On reading and filing the petition of Philip Henry Brown, Robert C. Martin, and John Paton, trustees under the first mortgage or deed of trust executed by the Toledo, Peoria and Western Railroad Company upon all its property and franchises, the affidavits of Edward F. Leonard, Jacob Johann, and Theodore Bergold, the report of Edmund T. Allen, Esq., the special master in the above-entitled cause, and on the consent of Wells H. Blodgett, Esq., the solicitor for the receivers of the Wabash, St. Louis and Pacific Railway Company, after hearing Mr. Henderson, of counsel for said petitioners, and Mr. Grover, of counsel for said receivers, on motion of
171 Foster & Thomson, solicitors for said petitioners, for the purposes of said application only, it is ordered that said report be, and the same hereby is, confirmed, and that Solon Humphreys and Thomas E. Tutt, said receivers of said Wabash, St. Louis and Pacific Railway Company, within ten days after the entry of this order, deliver to said Philip Henry Brown, Robert C. Martin, and John Paton, petitioners and trustees as aforesaid, the following property of the said Toledo, Peoria and Western Railroad Company, now in the possession and under the control of said receivers, conveyed by said deed of trust of said railroad company to said petitioners and trusees, and thereafter by lease, which has been duly adjudged forfeited and terminated, leased to said Wabash, St. Louis and Pacific Railway Company, to wit:

One 14 x 20 inch Corliss engine, with boiler for same, together with the necessary shafting, hangers, pulleys, and belting for running the tools.

One 40-inch swing, 14-foot bed, with bar and tools complete, for boring and turning cylinders and boring car wheels, together with number 133 of steel in tools, Bridgeport make.

One Bennet Dougherty car-wheel borer, with number 23 of steel in tools.

One Sellers axle lathe, with number 60 steel in tools.

One Bridgeport planer, 12-foot bed—will plane 24 in. wide and 22 in. high—with number 128 steel in tools.

172 One 14-inch Putnam hand lathe for brass-work, 7-foot bed.

One pattern-maker's lathe, 24-inch swing, and takes face-plate on tail end of head.

One Sellers compound planer, 9-inch stroke.

One Ferris & Mills slotter, 12-inch stroke.

One cram at wheel lathe, capable of raising 6,000 pounds.

Together with all the present appurtenances thereto, the lathes and plane-s being furnished with the necessary back and steady rests, chucks, cutters, tools, and wrenches; the vises, with the necessary drawers, cupboards, and tools for the use of machinists, and also the necessary hand taps, cutters, arbor reamers, countersinks, hubs, face-plates, templates, sledges, jacks, ratchets, barrows, screws, clamps, and wrenches for bolts, nuts, taps, etc., to facilitate the work of a railway machine shop.

One small set rolls.

Five anvils, one bolt anvil, together with the equipment thereof, consisting of the necessary sledges, swidges, formers, dies, tongs, and tools, and the necessary belting, shafting, hangers, and sliding cranes.

One 16-foot bed Daniels surfacing planer.

One number 3 Fay's mortising machine.

One number 5 Fay's scroll saw, with the necessary cutters, saws, bits and augers.

One bolt-cutter.

Two drill-presses.

One car saw.

173 One shaping machine.

One boring machine, having the necessary dies, taps, and drills.

One grindstone.

Fourteen vises and benches, together with the necessary shafting, center shafts, belts, and appliances for running said machinery.

One stationary 8 x 20 inch engine.

One iron oil tank for tempering springs.

And, it appearing that said receivers heretofore and on or about the seventeenth of October, 1884, received from the Peoria and Pekin Railroad Company the sum of twelve hundred dollars for the sale to said Peoria and Pekin Union Railroad Company of a driving-wheel lathe, part of the mortgaged and leased property in said petition referred to, it is further ordered that the said receivers, within the time hereinabove limited for the delivery of said property, pay to said petitioners, said trustees, said sum of twelve hundred dollars and interest thereon from said date of sale to the date of such payment; and it is further ordered that this order be without prejudice to the rights, if any, of said petitioners, said trustees, against said receivers for the collection of any moneys for which

they or the fund or property in their hands may be liable for or on account of the earnings of said property mortgaged to said
174 petitioners, said trustees, during said receivership or for rental under the lease thereof to the Wabash, St. Louis and Pacific Railway Company or for the use of any equipment, rolling stock, or personal property which may have come into the possession of said receivers or for the recovery of any such equipment, rolling stock, or personal property not herein mentioned or heretofore delivered by the receivers or for the conversion thereof.

175 Afterward, to wit, on the twenty-third day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said-entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

It is ordered that the stipulation now presented to this court shall be entered herein and made a part of the record herein, and that the same is hereby made a rule of this court, to wit:

United States Circuit Court, Northern District of Illinois, *ss:*

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK and Others } Original Bill.

and

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others } Cross-bill.

and

176 CHICAGO & WESTERN INDIANA RAILROAD COMPANY
vs.
THE CENTRAL TRUST COMPANY and Others. } Cross-bill.

And now comes the said The Central Trust Company of New York and James Cheney, by Williams & Thompson, their solicitors; The Wabash, St. Louis and Pacific Railway Company and The Mercantile Trust Company of New York, by its solicitors, and The Chicago and Western Indiana Railroad Company, by Charles M. Osborn, its solicitor, and the said parties stipulate that the sale of the property of the Wabash, St. Louis and Pacific Railway Company, which has been ordered in jurisdictions other than the northern district of Illinois, shall not in any manner affect the rights of either party in reference to the claims of the Chicago and Western Indiana Railroad Company, nor shall any sale, conveyance, trans-

fer, or assignment made under such decrees withdraw any of said railroad property or interests which lie within the northern district of Illinois from the jurisdiction of this the circuit court for the northern district of Illinois, but the same shall remain in the custody of the receivers of this court until such time as this court shall direct said property, in whole or from time to time in part, to be released or delivered to said purchaser or purchasers or any
177 of them, and shall afterward be subject to be retaken and, if necessary, resold, if the sum so charged or to be charged against said property or any part thereof in favor of the Chicago and Western Indiana Railroad Company, cross-complainant herein, shall not be paid within such time as this court may direct.

The conveyance and transfer of said property shall be subject to the power and jurisdiction of this court, and the purchasers of any part of said property within this jurisdiction shall thereby become and remain subject to said jurisdiction so far as necessary to the enforcement of this stipulation and of any decree which this court may make concerning said claim of said cross-complainant, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by the order of this court upon the claim of said cross-complainant aforesaid shall be fully paid and discharged. The provisions aforesaid shall apply to the purchaser or purchasers at said sale and to all persons taking said property through or under them. It is, however, understood that any party in interest shall have the right to appeal from the final decree of this court upon said claim of said cross-complainant, and in
178 such case the party shall abide the decree as finally entered in this court after such appeal is determined; and that this stipulation may be entered in the circuit courts of the United States for the northern district of Illinois, the southern district of Illinois, and the eastern district of Missouri and either or any of them; and that such order or orders may be made therein as may seem to said courts proper to secure the ultimate payment of said claim to said Chicago and Western Indiana Railroad Company, if the same shall be adjudged to be payable to it as a charge entitled in equity to priority over said mortgage debts.

(Five of these stipulations signed.)

THE CHICAGO AND WESTERN INDIANA RAILROAD COMPANY,
By CHARLES M. OSBORN, *Its Solicitor.*
THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO.,
By GREENE, BURNETT & HUMPHREY,
Its Attorneys.
THE MERCANTILE TRUST COMPANY,
By GREENE, BURNETT & HUMPHREY.
THE CENTRAL TRUST COMPANY OF NEW YORK & JAMES CHENEY,
By PHILLIPS & STEWART AND WILLIAMS & THOMPSON & BUTLER, STILLMAN & HUBBARD, *Their Att'ys.*

(Endorsed:) Filed Ap'l 23rd, 1886. Wm. H. Bradley, cl'k.

179 Afterward, to wit, on the sixth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* CENTRAL TRUST COMPANY OF NEW YORK *et al.* — In Chancery.

Now come the receivers herein, by Wells H. Blodgett, Esq., their solicitor, and now comes on to be heard the petition of said receivers, this day filed herein, for the appointment by this court of deputy United States marshals to protect the property of said railway company, and after hearing the arguments of said solicitor the court takes the same under advisement.

180 Afterward, to wit, on the seventh day of July, in the July term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* — In Chancery. Bill.

PHILIP HENRY BROWN and JOHN PATON *vs.* THE TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY *et al.* — In Chancery.

In the matter of the petition of Philip Henry Brown, John Paton, & Robert C. Martin, trustees, etc.

On reading and filing the petition in the action secondly above entitled of Philip Henry Brown, John Paton, and Robert C. Martin, trustees, for the payment to them by Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, of the value of certain rolling stock mortgaged by the defendant The Toledo, Peoria and Western Railroad Company to the petitioners and thereafter leased by said mortgagor to the said Wabash, St. Louis and Pacific Railway Company and de-
181 stroyed during the operation of the leased and mortgaged property by the said Humphreys and Tutt, receivers as aforesaid, and notice of motion thereon for the relief therein de-

manded, and also a statement of said receivers of the value of said rolling stock so destroyed at the time of destruction thereof, after hearing counsel, on motion of Foster & Thomson, solicitors for the petitioners appearing in said action first above entitled, wherein the Wabash, St. Louis and Pacific Railway Company is complainant, specially — solely for the purposes of the said application and not generally, W. H. Blodgett, Esq., their solicitor, appearing for said receivers, it is ordered that Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, within ten days from the date of this order, pay to Foster & Thomson, solicitors for said petitioners as aforesaid, the sum of three thousand and twenty-eight dollars and twenty-nine cents, the admitted value of said destroyed rolling stock at the time of the destruction thereof, together with interest at six per cent. per annum to the time of such payment.

On seventy dollars thereof from the fifteenth day of October, 1884.

On sixty-five dollars thereof from the first day of August, 1884.

On sixty-five dollars thereof from the eighth day of July, 1884.

On sixty-five dollars thereof from the fourth day of March,
182 1885.

On sixty-five dollars thereof from the twenty-third day of September, 1884.

On sixty-five dollars thereof from the first day of August, 1884.

On sixty-five dollars thereof from the sixteenth day of December, 1884.

On sixty-five dollars thereof from the thirteenth day of September, 1884.

On sixty-five dollars thereof from the twenty-third day of September, 1884.

On sixty-five dollars thereof from the sixteenth day of June, 1884.

On sixty-five dollars thereof from the twenty-ninth July, 1884.

On sixty-five dollars thereof from the sixteenth June, 1884.

On sixty-five dollars thereof from the nineteenth January, 1885.

On sixty-five dollars thereof from the twenty-third January, 1885.

On seventy dollars thereof from the thirty-first December, 1884.

On three hundred and one dollars and ninety-three cents thereof from the fourth day of March, 1884.

On seventy dollars thereof from the eleventh September, 1884.

On seventy dollars thereof from the twenty-seventh June, 1884.

On seventy dollars thereof from the second March, 1885.

183 On seventy dollars thereof from the twentieth November, 1884.

On seventy dollars thereof from the twenty-seventh June, 1884.

On seventy dollars thereof from the nineteenth September, 1884.

On seventy dollars thereof from the fourteenth June, 1884.

On seventy dollars thereof from the first October, 1884.

On seventy dollars thereof from the twenty-third September, 1884.

On seventy dollars thereof from the twenty-fourth September, 1884.

On seventy dollars thereof from the second of March, 1884.

On seventy dollars thereof from the twenty-second September, 1884.

On one hundred and seventy-eight dollars and twenty cents thereof from the sixteenth August, 1884.

On seventy dollars thereof from the tenth December, 1884.

On seventy dollars thereof from the twenty-fourth September, 1884.

On seventy dollars thereof from the twenty-fifth December, 1884.

And on five hundred and thirteen dollars and sixteen cents from the tenth day of June, 1885.

It is further ordered that such payment be without prejudice to the rights of the petitioners, and reserving their rights, if
184 any, against said receivers for the collection of any moneys for which said receivers or the fund or the property in their hands may be liable for rental of the said property mortgaged to said petitioners in said petition described under the lease thereof to the said Wabash, St. Louis and Pacific Railway Company, or for the recovery of any equipment, rolling stock, or personal property which may have come into their hands as such receivers or for the conversion thereof or for the use thereof.

185 Afterward, to wit, on the twenty-second day of July, in the July term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY *et al.*
} In Chancery.

The petition of Henry Lardner, heretofore filed, coming on to be heard and after hearing counsel for said petitioner and also counsel for said complainant and for the Central Trust Company, notice of this application to the solicitors for Henry F. Spalding and John T. Terry having been duly given and the court being now fully advised, it is ordered that said Henry Lardner be, and he is hereby, allowed to become a party defendant to this suit and to file an intervening petition or cross-bill herein, as he may be advised, for the purpose of protecting the rights of himself and all other holders of the bonds secured by the deed of trust bearing date July 1, 1880, to said Spalding and said Terry and referred to in said petition, who shall desire to become parties thereto.

And it is further ordered that Solon Humphreys and Thomas
186 E. Tutt, the receivers herein, make report within fifteen days from this date to this court, in writing, showing the earnings and expenses of the Chicago division of the Wabash, St. Louis and Pacific Railway Company from the 28th day of June, 1884, and showing also the methods by which they ascertain such earnings and expenses, and also the rentals which have accrued and also

which have been paid under the lease from the Chicago and Western Indiana Railroad Company to said Wabash, St. Louis and Pacific Railway Company from said 28th day of June, 1884, and from what fund so far as the same have been discharged they have been paid. Said receivers are also directed to make report of any facts which shall be necessary to enable the court to understand how said Chicago division has been managed and operated under their receivership.

187 Afterward, to wit, on the seventh day of December, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

It is hereby ordered that Thomas B. Atkins and Henry K. McHarg and others, who have heretofore filed their petition in this cause and obtained leave to institute an action in this court to foreclose two mortgages described in their bill of complaint and which constitute liens upon a portion of the railroad property of said complainant corporation now in the custody of this court and operated by the receivers thereof, have leave to withdraw their bill of complaint, which was filed in this court, and to docket the same and all of the papers which have been filed therein in the circuit court of the United States for the southern district of Illinois, and that thereupon the said cause shall be docketed and taken and held to be pending in said last-mentioned court in all respects as though
188 the said bill of complaint and petitions and papers filed therein had been originally filed in the said circuit court of the United States for the southern district of Illinois.

189 Afterward, to wit, on the thirty-first day of December, in the December term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs. } In Chancery.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.* } Consolidated Case.

It is ordered that the following order be entered as of the sixteenth instant:

And now, to wit, on the sixteenth day of December, 1886, comes the above-entitled cause on to be heard upon the application of

Charles H. Beers, complainant, in behalf of himself and all other bondholders secured by the first mortgage upon the Chicago division of the Wabash, St. Louis and Pacific Railway Company for the removal of Solon Humphreys and Thomas E. Tutt, present receivers of the property of said railway company within the State of Illinois, and it appearing to the court that the said Wabash, St. Louis and Pacific Railway Company and the parties necessary to be notified of this application have received due and timely notice of this motion, now, upon motion of Henry Crawford, solicitor
190 for the said complainant, Charles H. Beers, and certain other bondholders, petitioners, and after hearing Wager Swayne and Thomas H. Hubbard, of counsel for the purchasing committee; Wells H. Blodgett, for Solon Humphreys and Thomas E. Tutt, receivers; John L. Thompson, of counsel for the trustees of said mortgage, and Charles M. Osborn, of counsel for the Chicago and Western Indiana Railroad Company, opposed to the said motion, and upon the said bill of complaint, the testimony taken by the complainants on stipulation, the affidavits read in opposition to the motion, and the petitions of the bondholders in aid of the motion, and due deliberation being had, it is hereby ordered, adjudged, and decreed that Solon Humphreys and Thomas E. Tutt, heretofore appointed receivers of the property of the Wabash, St. Louis and Pacific Railway Company within the State of Illinois by an order made and entered in the United States circuit court for the northern district of Illinois on the twenty-eighth day of May, 1884, in a cause brought by the said Wabash, St. Louis and Pacific Railway Company against the Central Trust Company and consolidated with a cause brought by the Central Trust Company against the Wabash, St. Louis and Pacific Railway Company and others, be, and they are hereby, removed as receivers of the property of the said Wabash, St. Louis and Pacific Railway Company covered
191 by the said mortgage upon the Chicago division thereof, bearing date July first, A. D. 1880.

And the Honorable Thomas M. Cooley having been by this court in another cause this day appointed receiver of said property, it is further ordered, adjudged, and decreed that all parties herein and the said Humphreys and Tutt, their agents, officers, and attorneys, upon being notified of this order and of the approval of the bond of the said Thomas M. Cooley by the judge of this court, proceed to surrender, upon the thirty-first day of December, A. D. 1886, to the said Thomas M. Cooley, as receiver, or his duly appointed agent or agents all the lines of said railroad embraced within the terms of this order, and all the property, real, personal, and mixed, including all rolling stock, equipment, choses in action, books, papers, and accounts of the said Wabash, St. Louis and Pacific Railway Company in the possession of the said receivers that relate exclusively to the property that is the subject of this order; and the said Humphreys and Tutt are permitted to have such inspection and access to the said books and papers and accounts turned over by them to the receiver hereby appointed as may be

necessary to enable them to make and file the accounts they are hereby ordered to make and file.

And the said Thomas M. Cooley, as receiver, or his agents or employees shall at all times be permitted to make inspection and
192 copies of the books, papers, accounts, and vouchers kept by the said Humphreys and Tutt in the management and operation of any of the property in their charge as receivers, whether in the State of Illinois or elsewhere; that the said Humphreys and Tutt do forthwith proceed with all convenient speed, not later than sixty days from the making of this order, to file with the clerk of this court in this cause, as far as practicable, a just and true account of all their acts and doings as receivers as aforesaid with respect to the property embraced within the said mortgage, bearing date July first, 1880, from the date of their appointment, including a just and true inventory of the property, real, personal, and mixed, taken possession of by them as such receivers in the State of Illinois.

The following is a more particular and detailed description of the property that is the subject of this order, which is hereby ordered and directed to be surrendered as aforesaid to the said Thomas M. Cooley, receiver: All the Chicago division of the said Wabash, St. Louis and Pacific railway, commencing at Effingham, in the county of Effingham, in the State of Illinois, and extending thence northwardly through the counties of Effingham, Shelby, Moultrie, Piatt, Champaign, McLean, Ford, and Livingston, to Streator, in the county of La Salle, in said State of Illinois, with a branch or
193 extension thereof from Effingham to Altamont, in the county of Effingham aforesaid, the said line of railroad being the same formerly belonging to the Chicago and Paducah Railroad Company and known as the Chicago and Paducah railway; also the railroad commencing at Strawn, in the county of Livingston, in said State of Illinois, and extending thence northeastwardly through the counties of Livingston, Kankakee, and Will to or near the city of Chicago, in the county of Cook, in said State of Illinois, and known as the Chicago and Strawn railway, including the right of way, road-bed, embankments, tracks, ties, bridges, culverts, depots and depot grounds, and superstructures of every kind or nature whatsoever, and all machine shops and machinery and tools therein, and all cars, engines, and other property pertaining to said lines of railroads; also all the rights, privileges, and franchises of the said party of the first part relating to the said lines of railroad and the tolls, income, and earnings, rents, issues, and profits of the said railroads and every part thereof, with the said appurtenances, including all moneys, books, papers, accounts, or choses in action in the hands of any and all agents, clerks, or officers of the present receivers, and of all persons indebted to the said receivers or to the trust, intending hereby to direct and require the surrender to Thomas M.
194 Cooley, the receiver, as the officer of this court of all and singular the railway property of every kind, real, personal, or mixed, whether in possession or in action, covered by said mortgage, and especially the right to run all trains, engines, and cars over and upon the tracks and into the depots and freight stations of

the Chicago and Western Indiana Railroad Company and enjoy all and singular the rights and privileges and leasehold estate formerly held and owned in said terminal property in Chicago by the said Wabash, St. Louis and Pacific Railway Company by leases from the said Chicago and Western Indiana Railroad Company, and which leasehold and trackage rights and privileges have been hitherto possessed and enjoyed by the present receivers.

195 Afterwards, to wit, on the sixteenth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Now come the parties, by their solicitors, and now comes on to be heard the application of the trustees and first-mortgage bondholders of the Chicago division of said railway that the receiver of said Chicago division be discharged, and that the purchasing committee be put into possession of said division, and, after hearing the arguments of counsel in part at the hour of adjournment, it is ordered that further hearing of said application be postponed until to-morrow morning at ten o'clock.

196 Afterward, to wit, on the seventeenth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

Now again come the parties, by their solicitors, and this cause again comes on to be heard pursuant to the order of postponement entered herein yesterday, and, after hearing additional arguments of counsel, and the same not being concluded at the hour of adjournment, it is ordered that further hearing herein be postponed until tomorrow morning.

197 Afterward, to wit, on the eighteenth day of June, in the adjourned May term of said court, 1887, in the record of the

proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

Now again come the parties, by their solicitors, and this cause again comes on to be heard pursuant to the order of postponement entered herein yesterday, and, the court now having heard the concluding oral arguments of counsel and the said solicitors desiring to furnish briefs additionally, it is thereupon ordered that the petitioners have ten days in which to file their briefs; that the respondents have ten days thereafter in which to file briefs in answer thereto, and that the petitioners have five days thereafter in which to reply.

198 Afterward, to wit, on the tenth day of June, in the adjourned May term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK.
} In Chancery.

In the matter of the intervening petition of the Pennsylvania Railroad Company.

Now comes the Pennsylvania Railroad Company and presents to the court its printed supplemental intervening petition, and it prays leave of the court to file the same; upon consideration whereof it is ordered that leave be, and it is hereby, granted to the said Pennsylvania Railroad Company to file said intervening petition; and it is further ordered that the said Wabash, St. Louis and Pacific Railway Company, and that Solon Humphreys and Thomas E. Tutt, receivers herein, answer said supplemental intervening petition within twenty days from this order, notice of the entry of which shall be at once given to the said company and the said receivers.

199 On the same day, to wit, on the tenth day of June, 1889, came the Pennsylvania Railroad Company, by its solicitor, and filed in said clerk's office its supplemental intervening petition in said entitled cause; which said supplemental intervening petition is in the words and figures following, to wit:

200 In the United States Circuit Court, Northern District of Illinois, May Term, A. D. 1889.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, *et al.*

Bill for Appointment of Receiver, etc.

The Supplemental Intervening Petition of the Pennsylvania Railroad Company.

Your petitioner, The Pennsylvania Railroad Company, represents and shows unto the court, that it is a corporation created and existing under and by virtue of the laws of the State of Pennsylvania, for the purpose of transporting freight and passengers for hire.

That on the 12th day of January, 1885, it filed herein, by permission, its intervening petition, and therein and thereby substantially set forth and made known to the court facts as follows, to wit:

That on December 1, 1880, and during several years prior thereto, it operated and since said date has continued to operate numerous lines of railroad, including a line of railroad from Philadelphia, in the State of Pennsylvania to Jersey City, in the State of New
201 Jersey, from which latter point freight and passengers were and are ferried across Hudson river to the city of New York.

That on and prior to said date The Wabash, St. Louis and Pacific Railway Company, complainant in the above-entitled action, had issued and sold and received pay for coupon tickets so called, purporting to entitle the holders respectively to passage between such points on its line and such points on your petitioner's line as were designated thereon, and intermediately over such other lines as composed the various routes from starting points on the line of said Wabash, St. Louis and Pacific Railway line to points of destination on the line of your petitioner.

That during the time aforesaid permission on the part of your petitioner, and on the part of the managers or operators of other lines of railway, for the sale of coupon tickets over such lines respectively by the proprietor or operator of another line of railway was by custom given or withheld, according to what appeared to them to be for the best interests of their lines respectively.

That said Wabash, St. Louis and Pacific Railway Company, prior to the date above mentioned, had issued and sold and collected pay for a number of such coupon tickets purporting to entitle the holder to passage from Omaha, in the State of Nebraska, to the city of New York aforesaid, via its own line from Omaha aforesaid to the city of St. Louis, in the State of Missouri, thence over the line of the Ohio and Mississippi railway to Cincinnati, in the State of Ohio, thence over the line of the Marietta and Cincinnati railway to Parkersburg, in the State of West Virginia, thence over the line

of the Baltimore and Ohio railway to Baltimore, in the State of Maryland, thence over the line of the Philadelphia, Wilmington and Baltimore railway to Philadelphia aforesaid, and thence over the line of your petitioner to the city of New York aforesaid.

202 That on said December 1, 1880, your petitioner directed and ordered the said Wabash, St. Louis and Pacific Railway Company to discontinue the sale of coupon tickets reading via the said Baltimore and Ohio railway and the line of your petitioner to points north and east of Philadelphia, which said direction consisted of a telegraphic message, reading substantially as follows, to wit:

"DECEMBER 1, 1880.

"George H. Daniels, Wabash, St. Louis & Pacific railway, St. Louis, Missouri:

"On receipt hereof, please discontinue sale of tickets to all points north and east of Philadelphia, reading, via Baltimore & Ohio railroad and this line. Please answer.

"L. P. FARMER."

That said George H. Daniels, who was then the general ticket agent of the said Wabash, St. Louis and Pacific Railway Company, and a proper officer to receive and act upon said direction, thereupon on receipt of said message, replied to the same substantially as follows, to wit:

"ST. LOUIS, MISSOURI, *December* 1, 1880.

"L. P. Farmer:

"Tickets reading via Baltimore & Ohio railroad to points east and north of Philadelphia, have been ordered off sale.

"GEO. H. DANIELS."

That on or about December 2, 1880, a general notice was issued by your petitioner, and a copy thereof was mailed, addressed to an agent of the said Wabash, St. Louis and Pacific Railway Company at St. Louis, aforesaid, which said copy, with its address, is substantially as follows, to wit:

203 "Pennsylvania Railroad Company, passenger department.

"PHILADELPHIA, *Dec. 2nd*, 1880.

"*General Notice.*

"Connecting railway and transportation lines are hereby notified to discontinue the sale of tickets and the checking of baggage over this line between Philadelphia and New York, or other points via the Baltimore and Ohio railroad from date, and are respectfully informed that such tickets will not be honored or baggage received or forwarded after December 10th, 1880.

"By order of the 1st vice-president.

"L. P. FARMER,
"*Gen. Pass. Agent.*"

That subsequently, and on or about December 7, 1880, your petitioner received from said Wabash, St. Louis and Pacific Railway Company a written acknowledgment of the receipt of said notice, substantially as follows, to wit:

"WABASH, ST. LOUIS & PACIFIC RY., *December 4th*, 1880.

"H. C. Townsend, general passenger agent.

"L. P. Farmer, general passenger agent Pennsylvania Railroad Company, Philadelphia:

"I have received this day the notice to discontinue the sale of tickets between Philadelphia and New York, or other points, by the Baltimore and Ohio railroad and your line.

"H. C. TOWNSEND."

204 That, relying in good faith upon the aforesaid telegram from said George H. Daniels, your petitioner thereupon informed its agents, who, in the capacity of conductors, had charge of the collection of fares on its passenger trains, that the sale of such coupon tickets had been withdrawn on December 1, 1880, and your petitioner thereupon instructed its said agents not to receive in payment of fares the coupons of any such coupon tickets issued after said date.

That said Wabash, St. Louis and Pacific Railway Company having notified the said Baltimore and Ohio Railway Company of the direction of your petitioner, given as aforesaid, the said Baltimore and Ohio Railway Company, by L. M. Cole, its agent, in answer to said notice, sent a telegraphic message to said Wabash, St. Louis and Pacific Railway Company, substantially as follows, to wit:

"The American Union Telegraph Co.

"This telegram rec'd at N. W. corner 3d and Pine Sts. Dated

"BALTIMORE, MD., *Dec.* 2, 1880.

"To Geo. H. Daniels, Wabash R'y, St. L.:

"Please get up quickly tickets New York and points east by B. & O., and Boundbrook route trains run Chicago & Cin'ti N. Y., without change. Coupons should read Balto., Phila. & Boundbrook R. R., Phila. and Reading R. R., Phila. & Boundbrook Central R. R., New Jersey, Boundbrook, N. Y., until you get them on continue sales Penn. R. R., tickets by B. & O., reporting entire proportion east Baltimore to B. & O., we are exchanging, and will protect; answer.

"L. M. COLE."

205 Which said message was received by said Daniels on or about the day of its date. That said Daniels, as ticket agent of the said Wabash, St. Louis and Pacific Railway Company, relying, as your petitioner believes and charges the fact to be, upon the proffered protection offered by the said Baltimore and Ohio Rail-

way Company, by L. M. Cole, its agent as aforesaid, continued the sale of such coupon tickets on and after the 2d day of December, 1880, without any notice thereof to or knowledge on the part of your petitioner. And without any notice to or knowledge on the part of your petitioner, the said Wabash, St. Louis and Pacific Railway Company, by its local ticket agent at Omaha aforesaid, on the 7th day of said December, 1880, sold and delivered to one William J. Connell a coupon ticket purporting to entitle the holder to transportation from Omaha aforesaid to the city of New York aforesaid, over the said Wabash, St. Louis and Pacific railway, the Marietta and Cincinnati railway, the Baltimore and Ohio railway, the Philadelphia, Wilmington and Baltimore railway and your petitioner's said railway.

That on or about December 16, 1880, the said William J. Connell, then the holder of said ticket, took passage upon a train of your petitioner, at Philadelphia aforesaid, bound for the city of New York. That after said train had started on its way, and was a short distance from Philadelphia, the said Connell was called upon by the conductor of said train for fare, whereupon said Connell produced and offered to the conductor, in payment of fare from Philadelphia to the city of New York, aforesaid, the coupon ticket, the issuance and existence of which your petitioner was not aware, the same being of a kind which your petitioner had been in-
206 formed by the said Wabash, St. Louis and Pacific Railway Company, had been withdrawn from sale on the 1st day of December, 1880. That the said conductor (B. F. Wilson by name) thereupon informed the said Connell that said ticket was not good for such passage, and truthfully informed him further that it would be contrary to his instructions to receive the same therefor. That said Connell refused to pay fare (otherwise than by surrender of said ticket), and was thereupon informed by said conductor that he (said Connell) would have to leave the train; and the said conductor thereupon stopped the said train at Tacony, a regular station on said line, and when the train was then and there stopped, the conductor asked the said Connell to pay fare or to get off said train. That said Connell thereupon refused to pay fare (other than by surrender of said ticket), and refused also to get off said train. That said conductor thereupon, without unnecessary force, expelled the said Connell from said train and proceeded on to New York, leaving the said Connell at Tacony aforesaid.

That said Connell afterwards brought a suit at law against your petitioner, first in the United States circuit court for the southern district of New York, and afterwards, on January 19, 1882, in the superior court of Cook county, Illinois, wherein said Connell claimed damages to the amount of $15,000, as resulting from his expulsion aforesaid. Summons was duly served on your petitioner, who, to save default, caused its appearance to be entered, and a plea of the general issue to be filed therein. That on May 29, 1882, your petitioned caused the said Wabash, St. Louis and Pacific Railway Company to be informed in writing of the fact of the commencement of

said suit, and of your petitioner's intention to look to said
207 company for reimbursement of any amount which your petitioner might be compelled to pay as damages or otherwise, in consequence of the sale of said ticket to said Connell. And the said Wabash, St. Louis and Pacific Railway Company was therein and thereby invited to join your petitioner in conducting the defense of said cause. A copy of which said writing is hereto attached, marked Exhibit A, and made a part of this petition.

That said suit came on for trial at the May term of said superior court, 1882, before the Hon. Elliott Anthony, one of the judges of said court, and a jury. That your petitioner in the absence of any appearance by the said Wabash, St. Louis and Pacific Railway Company, and in the absence of any request to the contrary, caused the attendance of counsel and likewise the attendance of witnesses at said trial, and therein and thereby interposed such defense as seemed to your petitioner to be just and proper. That said trial after many days' duration resulted in a verdict against your petitioner for $15,000. That a motion for a new trial was thereupon entered on behalf of your petitioner and subsequently argued at length by both sides, whereupon the court allowed said motion and set aside said verdict.

That afterwards and at the May term of said superior court, 1883, said cause came on for a second trial, and was tried before the Hon. J. E. Gary, also one of the judges of said court, and a jury. That upon said trial, as upon the preceding one, your petitioner, in the absence of any appearance by the said Wabash, St. Louis and Pacific Railway Company, and in the absence of any direction to the contrary, caused the attendance of counsel and likewise the attendance of witnesses at said trial, and
as before, therein and thereby interposed such defense
208 as to your petitioner seemed just and proper. That said second trial after many days' duration, resulted as before in a verdict against your petitioner for the sum of $15,000. A motion for a new trial was thereupon entered on behalf of your petitioner, and was fully argued by counsel on both sides. That said motion was overruled and judgment was entered on said verdict. That your petitioner, on the advice of counsel, caused an appeal to be prayed and perfected from said judgment to the appellate court of said State, and before the said last-named tribunal obtained by oral and printed argument a review of the evidence and an examination into the law applicable thereto. That said appellate court, upon consideration, affirmed said judgment February 12, 1884, with costs. That your petitioner, upon the advice of counsel caused an appeal to be taken and perfected from the judgment of said appellate court to the supreme court of the State of Illinois, and by oral and printed argument obtained a review of the law applicable to said cause.

That said supreme court upon consideration reversed the said judgment of the appellate court and remanded said cause May 18, 1884, and thereupon filed an opinion expressing reasons for such reversal.

That your petitioner filed with its said petition a copy of the said

opinion of the supreme court of Illinois, and prayed that the costs and expenses which it had incurred might be ascertained, and that a rule be entered requiring the receivers therein to show cause why they should not be required to pay the same with your petitioner's reasonable costs.

That Exhibit "A" attached to said petition is as follows, to wit:

209 EXHIBIT A.

PHILADELPHIA, *May 13th*, 1882.

To the Wabash, St. Louis and Pacific Railway Co.:

W. J. Connell has brought suit against the Pennsylvania Railroad Company in the superior court, Cook county, Illinois, February term, 1882, to recover damages from the said company in the sum of $15,000 for an alleged breach of contract for declining to accept from him, December 16, 1880, in payment of passage fare from Philadelphia to New York, a ticket alleged to have been sold to him at Omaha, December 7, 1880, by Frank E. Moores, agent, reading via Wabash, St. Louis and Pacific R'y, Baltimore and Ohio R. R. and Pennsylvania R. R., Council Bluffs to New York, form O, 145, No. 5.

As under the notice given by the Pennsylvania Railroad Company to the Wabash, St. Louis and Pacific Railroad Company, December 2, 1880, the latter had no authority whatever to sell the ticket referred to, the Pennsylvania Railroad Company will look to the Wabash, St. Louis and Pacific Railroad Company for reimbursement of any amounts the former may be compelled to pay as damages or otherwise in consequence of the sale of such ticket to said Connell as alleged.

Having this interest in the suit, your company will probably desire to join the Pennsylvania Railroad Company in conducting the defense, and you are hereby invited to do so.

JOHN SCOTT,
General Solicitor.

210 Service of the foregoing notice accepted this 29th day of May, 1882.

WELLS H. BLODGETT,
Gen. Solicitor W., St. L. & P. R'y Co.

That by order of court entered on the said 12th day of January, 1885, the receivers in said cause were required to answer unto said petition within fifteen days. And thereupon on the 14th day of February, 1885, the said receivers filed their answer therein substantially as follows, to wit:

The answer of Solon Humphreys and Thomas E. Tutt, receivers of the complainant in the above cause, to the intervening petition of the Pennsylvania Railroad Company, therein respectfully shows that they have no knowledge of the matters and things set forth in said petition except from the statements therein contained, and

hence do neither admit nor deny them but will insist on strict proof thereof.

But they say and show to this court that it appears on the face of said petition that the supposed cause of action on the part of the said Pen-sylvania Railroad Company against the Wabash, St. Louis and Pacific Railway Company arose out of the unauthorized sale by the last-named company of a coupon ticket for a passage from Omaha to New York over the line of railroad between Philadelphia and New York operated by said intervening petitioner. And that if any cause of action on the part of such petitioner growing out of the sale of such ticket ever existed against the said Wabash,
211 St. Louis and Pacific Railway Company it arose more than a year before the filing of the original bill in this cause and the appointment of receivers thereunder, and could in no manner be allowed or construed to be a claim entitled to any priority of payment over the other general floating and unsecured indebtedness of said Wabash, St. Louis and Pacific Railway Company existing more than six months prior to the existing receivership under the original bill in this cause.

But these receivers further deny that the said Pennsylvania Railroad Company ever had any ground of action whatever against the said Wabash, St. Louis and Pacific Railway Company growing out of the sale of said ticket, but on the contrary if the sale of said ticket by such last-named company was unauthorized, the said W. J. Connell alone had a cause of action against it on account of such attempted sale and the refusal of said Pennsylvania Railroad Company to honor such ticket, and if said last-named company rightfully rejected such ticket, said Connell had no cause of action for his expulsion from its train under the circumstances referred to in said petition. And said Wabash, St. Louis and Pacific Railroad Company could not be made liable for the expense attendant upon an unfounded action brought by said Connell against said Pennsylvania Railroad Company, and on the other hand if said Pennsylvania Railroad Company was not justified in rejecting said ticket and in expelling said Connell from its train, then it should bear the consequence of its own illegal act.

Your petitioners therefore pray that the rule entered upon the said petition may be discharged and the petitioner held to be entitled to no relief thereunder.

212 Your petitioner further shows that on the 14th day of February, 1885, an order was entered whereby the matter of said petition and answer was referred to John I. Bennett, a master in chancery of said court, to ascertain and report the amount paid by the petitioner in the matter of the suit mentioned in said petition. And that the said petitioner and the said receivers, by their respective solicitors, afterwards appeared before said master and proof was thereupon taken, and upon such proof so taken, the said master, under date of March 18, 1885, reported in substance that your petitioner had expended various sums aggregating $577.50, not including expenses for attorneys' services in the matter of said suit and that the services of attorneys performed in said suit were

reasonably worth the sum of $2,000. And that the petitioner had paid $1,500 of that amount, leaving the sum of $500 unpaid. Which said report was duly approved on the 25th day of March, 1885.

Your petitioner further shows that, since the proceedings aforesaid various steps have been taken in said cause including a trial in February, 1887, wherein a verdict and judgment for the sum of $7,000 was obtained against your petitioner, and including an appeal from said judgment to the appellate court of Illinois, first district, and a further appeal by your petitioner to the supreme court of Illinois where said judgment was finally affirmed.

Your petitioner further shows that the necessary and reasonable costs and expenses of said proceedings since the master's report aforesaid, amount to the sum of $13,500, or thereabouts, including said judgment and the interest thereon, and your petitioner prays that the court will take cognizance of this, its supplemental petition,

213 and that a rule may be entered requiring the receiver herein to answer the same, and to show cause, if any he has, why an order should not be entered herein for payment to your petitioner of the costs, expenses, judgment and interest so as aforesaid paid by it, and that this petition may be referred to a master of this court to determine the amount of such reasonable costs and expenses and proximate damages; and that your petitioner may have such other and further relief in the premises as justice and equity may warrant, and to the court shall seem meet.

And your petitioner will ever pray.

PENNSYLVANIA RAILROAD CO.,
By GEO. WILLARD, *Its Solicitor.*

GEO. WILLARD,
Sol'r for Petitioner.

214 UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

George Willard, being duly sworn, says that he is an attorney for the Pennsylvania Railroad Company, the intervenor named in the above and foregoing supplemental petition; that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters set forth on information and belief, and that as to those matters he is informed and believes them to be true.

GEO. WILLARD.

Subscribed and sworn to before me this 8th day of June, A. D. 1889.

[SEAL.] C. F. LOESCH,
Notary Public.

Endorsed: Filed June 10, 1889. Wm. H. Bradley, clerk.

215 Afterward, to wit, on the eighth day of July, in the July term of said court, 1889, in the record of the proceedings

thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

Now come the receivers, by their solicitors, and move for leave to withdraw their answer to the original petition of the Pennsylvania Company and for leave to demur to the original and supplemental petitions of said company. The hearing on the same is postponed until notice be given said petitioner.

216 Afterward, to wit, on the sixteenth day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

Now come the parties, by their solicitors, and on motion it is ordered by the court that the reference to the master in the matter of the intervening petition of the Pennsylvania Company to the master's report and the order of confirmation are set aside, with leave to the receivers to withdraw their answer to the original intervening petition of the Pennsylvania Company, and leave is also by the court given to the complainant and to the receivers to file instanter their respective demurrers to the original and supplemental intervening petitions herein, which is accordingly done.

On the same day, to wit, on the sixteenth day — July, 1889, came the Wabash, St. Louis and Pacific Railway Company, by its solicitors, and filed in said clerk's office its demurrer to the original and
217 supplemental intervening petitions of the Pennsylvania Railroad Company in said entitled cause; which said demurrer is in the words and figures following, to wit:

Circuit Court of the United States, Northern District of Illinois.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Equity.

The demurrer of the Wabash, St. Louis and Pacific Railway Company to the original and supplemental intervening petition of the Pennsylvania Railroad Company.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said original and supplemental intervening petitions contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said intervening petition and for cause of demurrer shows that said intervenor has not in its said intervening petitions made or stated such a case as entitles it in a court of equity to any relief from or against this defendant; that, assuming the allegations of said intervening petitions to be true, which this defendant doth in nowise admit, the remedy of said intervenor, if any, as against this defendant is in a court of law, and that the matters set forth in said intervening petitions are not cognizable in a court of equity.

218 Wherefore, and for other good causes of demurrer appearing in the said intervening petitions, this defendant demurs to the same and to all matters and things therein contained and prays judgment of this honorable court whether it shall be compelled to make any further or other answer to said intervening petitions, and it prays to be hence dismissed, etc.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO.,
By WELLS H. BLODGETT &
GEO. B. BURNETT, *Its Solicitors.*

(Endorsed:) Filed July 16, 1889. Wm. H. Bradley, clerk.

On the same day, to wit, on the sixteenth day of July, 1889, came Solon Humphreys and Thomas E. Tutt, receivers, &c., by their solicitors, and filed in said clerk's office their demurrer to the original and supplemental intervening petitions of the Pennsylvania Railroad Company in said entitled cause; which said demurrer is in the words and figures following, to wit:

219 Circuit Court of the United States, Northern District of Illinois.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Equity.

The demurrer of Solon Humphreys and Thomas E. Tutt to the original and supplemental intervening petitions of the Pennsylvania Railroad Company.

Said receivers, by protestation, not confessing or acknowledging all or any of the matters and things in the said intervening petitions contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said intervening petitions, and for cause of demurrer show that it does not appear from said intervening petitions that said intervenor has any interest by way of lien or otherwise in the property which forms the subject-matter of the suit in which these respondents were appointed receivers, and said intervening petitions do not state any facts which would authorize this honorable court to decree the alleged claim of said inte-venor a lien upon said property or upon any funds in the hands of these respondents as such receivers.

Wherefore, and for divers other good causes of demurrer appearing in the said intervening petitions, these defendants demur to the same and to all matters and things therein contained and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said intervening petitions, and they pray to be dismissed, etc.

SOLON HUMPHREYS,
THOMAS E. TUTT, *Receivers.*

220 By WELLS H. BLODGETT &
GEO. B. BURNETT,
Their Solicitors.

(Endorsed:) Filed July 16, 1889. Wm. H. Bradley, clerk.

221 Afterward, to wit, on the twenty-sixth day of February, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

In the matter of the intervening petition of the Pennsylvania Company.

Now come the parties, by their solicitors, and now comes on to be heard the demurrer of Solon Humphreys and Thomas E. Tutt, receivers, to the original and supplemental petition of said intervening petitioner, and, after hearing the arguments of counsel, the court takes the same under advisement.

222 Afterward, to wit, on the fourth day of September, in the July term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE WABASH, ST. LOUIS AND PACIFIC RAILROAD COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} Chancery.

Intervening petition of Pennsylvania Railroad Co.

The court, having considered and being now fully advised upon the demurrer heretofore filed by the receivers of the said complainant to the intervening petition, original and supplemental, of the Pennsylvania Railroad Company, overrules the same, and the defendants are ruled to answer by the first Monday of October next.

Afterward, to wit, on the tenth day of September, 1890, came Solon Humphreys and Thomas E. Tutt, receivers, &c., by their solicitors, and filed in said clerk's office their answer to the intervening petition of the Pennsylvania Railroad Company in said entitled cause; which said answer is in the words and figures following, to wit:

223 Circuit Court of the United States, Northern District of Illinois. In Chancery.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants.
} Bill for Receivership, &c.

The answer of Solon Humphreys and Thomas E. Tutt, late receivers of the complainant in the above cause, to the intervening

petition of the Pennsylvania Railroad Company therein respectfully shows that they have no knowledge of the matters and things set forth in said petition except from the statements therein contained, and hence do neither admit nor deny them, but will insist on strict proof thereof.

But they say and show to this court that it appears on the face of said petition that the supposed cause of action on the part of the said Pennsylvania Railroad Company against the said Wabash, St. Louis and Pacific Railway Company arose out of the alleged unauthorized sale by the last-named company of a coupon ticket for a passage from Omaha to New York over the line of railroad between Philadelphia and New York, operated by said intervening petitioner, and that if any cause of action on the part of such petitioner growing out of the sale of such ticket ever existed against the said Wabash, St. Louis and Pacific Railway Company it
224 arose more than a year before the filing of the original bill in this cause and the appointment of receivers thereunder, and could in no manner be allowed or construed to be a claim entitled to any priority of payment over the other general floating and unsecured indebtedness of said Wabash, St. Louis and Pacific Railway Company existing more than six months prior to the existing receivership under the original bill in this cause.

These respondents, further answering, say that the alleged unauthorized sale of said ticket by said Wabash, St. Louis and Pacific Railway Company to said Connell was not the proximate cause of the recovery of said judgment by said Connell against said intervenor, but that said judgment was recovered upon the ground of the excessive and unnecessary force used by the servants of intervenor in expelling said Connell from its cars, and the said judgment resulted from the wrongful act of said intervenor, and not from any act of said Wabash, St. Louis and Pacific Railway Company or its agents.

And respondents, having fully answered, pray to be hence dismissed, &c.

SOLON HUMPHREYS &
THOMAS E. TUTT, *Receivers*,
By GEO. B. BENNETT, *Their Sol'r.*

(Endorsed:) Filed Sep. 10, 1890. Wm. H. Bradley, clerk.

Afterwards, to wit, on the second day of October, 1890, came the Pennsylvania Railroad Company, by its solicitor, and filed in said clerk's office its replication to the answer of Solon Humphreys and Thomas E. Tutt in said entitled cause; which said replication is in the words and figures following, to wit:

225 *Replication of the Penn. Railroad Co.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court Thereof.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
CENTRAL TRUST COMPANY *et al.*, Defendants. } In Chancery.

Bill for appointment of receiver.

The Replication of the Intervening Petitioner, Pennsylvania Railroad Company, to the Answer of Solon Humphreys and Thomas E. Tutt, Receivers, Defendants.

This repliant, saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its said intervening petition to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant;

Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to maintain and prove as this honorable court shall direct,
226 and humbly prays as in and by its intervening petition it has already prayed.

GEO. WILLARD,
Sol'r for Intervenor.

(Endorsed:) Filed Oct. 2, 1890. Wm. H. Bradley, clerk.

Afterward, to wit, on the fourteenth day of October, 1890, came the Wabash, St. Louis and Pacific Railway Company, by its solicitors, and filed in said clerk's office its answer to the intervening petition of the Pennsylvania Railroad Company in said entitled cause; which said answer is in the words and figures following, to wit:

227 In the Circuit Court of the United States, Northern District of Illinois.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Complainants,
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants.
} In Chancery.

The Answer of the Wabash, St. Louis and Pacific Railway Company to the Intervening Petition of the Pennsylvania Railroad Company.

This respondent, for answer to said intervening petition and to so much and such parts thereof as it is advised it is material to make answer unto, answering, says: Respondent believes the allegations of said petition as to the sale of the ticket to said Connell and his expulsion from the cars of intervenor and the recovery of the judgment against said intervenor by said Connell to be true, but respondent avers the fact to be that said alleged unauthorized sale of said ticket by respondent to said Connell was not the proximate cause of the recovery of said judgment by said Connell against said intervenor, but that said judgment was recovered upon the ground of the excessive and unnecessary force used by the servants of intervenor in expelling said Connell from its cars, and that said judgment resulted from the wrongful act of said intervenor and not from any act of said respondent.

Respondent, further answering, says that if said intervenor has any claim against respondent growing out of the matters set
228 forth in said intervening petition it is cognizable only in a court of law, and that a court of equity has no jurisdiction to grant the relief prayed for in said intervening petition; and respondent claims the same advantage of this answer as if it had demurred to said intervening petition.

Having fully answered, respondent prays to be hence dismissed with its costs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,
By G. B. BENNETT, *Its Solicitor.*

(Endorsed:) Filed Oct. 14, 1890. Wm. H. Bradley, clerk.

Afterward, to wit, on the sixteenth day of October, 1890, came the Pennsylvania Railroad Company, by its solicitor, and filed in said clerk's office its replication to the answer of the Wabash, St. Louis and Pacific Railway Company in said entitled cause; which said replication is in the words and figures following, to wit:

229 UNITED STATES OF AMERICA, } ss:
Northern District of Ills., }

In the Circuit Court Thereof.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant, *vs.* CENTRAL TRUST COMPANY *et al.*, Defendants. } In Chancery.

Bill for appointment of receiver.

The Replication of the Intervening Petitioner, Pennsylvania Railroad Company, to the Answer of said Wabash, St. Louis and Pacific Railway Company.

This repliant, saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its said intervening petition; without this, that any other matter or — effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to maintain and prove as this honorable court shall direct, and humbly prays as in and by its said intervening petition it has already prayed.

GEO. WILLARD,
Sol'r for Inte-venor.

(Endorsed:) Filed Oct. 16, 1890. Wm. H. Bradley, clerk.

230 Afterward, to wit, on the twenty-second day of November, in the adjourned October term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

In the matter of the intervening petition of the Pennsylvania Railroad Company.

The cause of said intervenor being at issue, it is ordered, *nunc pro tunc* as of the eighteenth instant, that the same be referred to John I. Bennett, master in chancery, to take proofs and report the same with all convenient speed.

Afterward, to wit, on the sixteenth day of January, 1891, came John I. Bennett, one of the masters in chancery of said court, and

filed in said clerk's office his report in said entitled cause; which said report together with the evidence and exhibits therein referred to are in the words and figures following, to wit:

231 *Master's Report of Evidence on Intervening Petition of Penn. R. R. Co.*

United States Circuit Court, Northern District of Illinois.

THE WABASH, ST. LOUIS & PACIFIC R'Y CO.
vs.
THE CENTRAL TRUST CO. OF N. Y., JAS. CHENEY, *et al.* } In Chancery.

Intervening petition of the Pennsylvania Railroad Company.

To the honorable the judges of said court:

In pursuance of the order of reference entered in said cause on the 18th day of November, 1890, the parties appeared before me, at my office, on the 19th day of November, 1890, John C. Richberg, Esq., appearing on behalf of the intervenors, and W. H. Lee, Esq., on behalf of the Wabash, St. Louis & Pacific R'y Co. and others.

The said solicitor for the complainant was attended by George Willard, Esq., who, being first duly sworn by me, testified in said cause on behalf of the intervenors, being sworn and commencing his testimony at the time last aforesaid; whereupon the further taking of the testimony in the said cause was adjourned until the 15th day of January, 1891, at which time the said solicitors again appeared before me, at my office, the said solicitor for the intervenors again attended by the said witness, when the taking of
232 the evidence of the said witness was completed, and there being no evidence offered on the part of the said R'y company or others testimony was closed.

I herewith subjoin the testimony of the said Willard, consisting of seven pages, and report herewith the exhibits offered in evidence in connection with said testimony, which are respectively marked "A," "B," "C," and "D," which testimony and exhibits I hereby make a part of this report.

I further report that the said testimony was taken down in my presence and under my direction, and that the same correctly states the evidence of said witness given before me in all respects. All of which is respectfully submitted.

JOHN I. BENNETT,
Master in Chancery for the United States Circuit Court for the Northern District of Illinois.

Master's Fees.

Two days' attendance	$10 00
Taking of testimony, swearing of witness, and filing of exhibits	10 00
Making and filing master's report	15 00
Total	$35 00

233 United States Circuit Court, Northern District of Illinois.

THE WABASH, ST. LOUIS & PACIFIC R'Y CO.
vs.
CENTRAL TRUST COMPANY *et al.*

In pursuance of notice served by counsel the parties in the above-entitled case appeared by their solicitors, John C. Richberg appearing for the intervening petitioner and W. H. Lee appearing as solicitor for the defendants; whereupon GEORGE WILLARD, being duly sworn, testified as follows, to wit:

Since the report of the master upon the original petition there has been two trials of the case—one which resulted in the disagreement of the jury and the other resulting in the affirmance by the supreme court of a judgment for seven thousand dollars. I present an abstract of the record before the supreme court in the case of the affirmance of the $7,000 judgment, which record is offered in evidence by the solicitor for the intervening petitioner and marked by the master Inte-venor's Exhibit "A."

Mr. LEE reserves right to object.

In pursuance of agreement of counsel further taking of testimony in this case is adjourned until Thursday, January 15th, 1891, at 10 o'clock a. m.

234 JANUARY 15TH, 1891—10 o'clock a. m.

By Mr. RICHBERG: The counsel for intevenor offers in evidence two copies of two supreme court briefs on the second appeal of the case, marked Inte-venor's Exhibits "B" and "C" respectively.

Mr. Lee objects. Subject to objection inte-venor offers in evidence the statement of amounts paid by it to settle judgment, costs, attorneys' fees, and other expenses incurred since March 18th, 1885, marked Inte-venor's Exhibit "D."

Q. Please look at Inte-venor's Exhibit "D" and state what you know with reference to the services rendered and the moneys paid, as shown upon that exhibit.

A. I have personal knowledge as to the payment of all the items on this statement, excepting the third item from the top—J. R. Wood, $290.50. That item is intended to cover, as I understand, the expenses of the witnesses who came here from Philadelphia to attend the trial. They were the conductor and brakeman on the train and the chief clerk in the general passenger agent's office in Philadelphia. The amount I am satisfied is correct and just. The amount charged for attorneys' fees and services I believe to be entirely reasonable for the services they performed. I have a general knowledge of the rates of charge here and have had such knowledge for fifteen years. I think they are entirely reasonable, especially those charged by Willard & Driggs and myself. The aggregate of the items in the statement amount to $13,328.94 and they are exclusive of the items heretofore proven before the master and re-

ported upon by report filed March 18th, 1885. That report and the evidence contained in it, I understand, is by stipulation of
235 counsel to remain in full force in the case.

It is agreed by counsel that the opinion of the supreme court on the last hearing of the case reported in 127 Illinois Reports, page 419, may be referred to as evidence in the case, subject, however, to all right of objection and exception on the part of the defendant as to its relevancy and materiality.

Cross-examination by Mr. LEE:

Q. Mr. Willard, this item in the statement offered by you as the J. R. Wood expenses to the amount of $290.50 you have no personal knowledge of, as I understand?

A. No, sir; further than *than* that I know the witnesses attended here on the two last trials of the case.

Q. The actual expenditure to that amount, so far as you have stated, then is only hearsay?

A. That is all.

Q. Please explain the item in March, 1887, "P. Goodwin, services and expenses, $100." State what that was for.

A. Mr. Goodwin was a prominent citizen of Omaha, well acquainted with the defendant, and at our instance he came here and gave us valuable points on the trial of the case.

Q. The item, $100, the amount, $100, you personally know was proper and was expended?

A. Yes, sir; yes, sir; Willard & Driggs gave him their check for that amount, which was afterwards reimbursed by the inte-venor.

Q. And all the other items mentioned in this statement, with the exceptions noted, you have personal knowledge have been paid?

A. Yes, sir.

236 Q. By the Pennsylvania Railroad Company?

A. Yes, sir.

Q. Now, please state how it is with reference to attorneys, as shown by this statement.

A. I have personal knowledge as to the payment of those items.

Q. Those items have all been paid?

A. Yes, sir; in good faith for actual services performed.

Q. Both with reference to A. S. Trude, in whose account there appeared two items, and also an account with Willard & Driggs and George Willard?

A. Yes, sir.

Q. Mr. Willard, you have and have had for some years an official position as attorney or general solicitor for the Pennsylvania Company in this city, have you not?

A. Yes, sir; as solicitor.

Q. As solicitor?

A. Yes, sir.

Q. Did you and have you, during the period covered by these items of expenses, practiced exclusively for the Pennsylvania Co.?

A. Not exclusively; no, sir.

Q. Is it not true that these services, for which are charged attorneys' fees on account of Willard & Driggs and George Willard, were rendered for the Pennsylvania Company in your official capacity?

A. No, sir; that relation had only the effect to reduce the fees of Willard & Driggs and G. Willard about 30 per cent. from the amount of the bill they rendered at first, which I think was reasonable as first charged, but, owing to their relation as solicitors for the Pennsylvania Company in Chicago, it was suggested that the amount charged should be reduced, which was accordingly done.

Q. The understanding would be, then, that in case these fees are recovered the Pennsylvania Railroad Company should be
237 reimbursed to the amount which you have had paid you, according to this statement?

A. Yes, sir.

Q. Now, Mr. Willard, please state upon what you base the reasonableness of the charges in this statement for attorneys' fees, both with reference to A. S. Trude, Willard & Driggs, and yourself.

A. The fees of Willard & Driggs and myself were on the basis of about fifty dollars a day for actual work performed—a full day's time. The fees of Mr. Trude were charged on the basis of about one hundred dollars a day actual services rendered—a full day's work.

Q. Have you or did you make any inquiries from lawyers in general practice as to the reasonableness of this basis of estimation for like services or was it adjusted upon what you yourself as an attorney would consider it to be fair?

A. It was upon my knowledge of what other attorneys in like standing charged for similar services.

Q. You made, however, no inquiry or investigation with reference to these particular services?

A. No, sir.

Q. The estimates were based upon your general knowledge of such matters?

A. From general and special knowledge I had occasion or rather I participated in the taking of a large number of depositions of attorneys in this city in a case in New York involving the question of attorneys' fees for services performed in this city by leading reputable attorneys for services in behalf of corporations similar to this. That gave me a special knowledge in that regard in addition to a general knowledge which I had acquired in my acquaintance with attorneys here and with their rates of charges.

238 Q. As I understand, you have testified all these items have been paid, disbursed, and expended by the Pennsylvania Company?

A. The Pennsylvania Railway Company.

Q. And has the Pennsylvania Company—the Pennsylvania Railway Company—been reimbursed any of these items that you know of?

A. No, sir.

Witness recalled by intervenors.

By Mr. RICHBERG:

Q. Please explain, if you desire to do so, whether in your testimony with reference to the amount of the indebtedness you have included the $500 mentioned in the master's report heretofore filed in the case.

A. My evidence regarding items and payments of items shown in Exhibit D does not include any items shown in the previous examination before the master, whose report was filed March 18th, 1885. The $500 attorneys' fees shown in that report to have been then unpaid still remain unpaid, but I hope to collect it some time, as I think it is justly and properly due.

Recross-examination by Mr. LEE:

Q. The total amount of expenses and disbursements to date by the Pennsylvania Railway Company, as shown by your statement here today and the master's former report, have been, then, all paid by the intervenors but that sum of $500 for attorneys' fees?

A. Yes, sir; all the items shown in the master's previous report in this case and shown in Exhibit D herewith have been
239 actually paid, as explained in my evidence, excepting the item of $500 referred to in the master's report of March 18th, 1885.

(Agreed by counsel that signature of witness is waived.)

JOHN I. BENNETT, *Master, &c.*

240–243 INTERVENOR'S EX. "D."

Statement of amounts paid by the Pennsylvania Railroad Company to settle judgment, costs, attorneys' fees, and other expenses incurred since March 18, 1885, in the suit of William J. Connell against said company, brought in the superior court of Cook county, Illinois.

1886.		
June.	Pinkerton agency, services in Omaha	$867 01
	Willard & Driggs, att'ys, disbursements ..	115 27
	J. R. Wood, expenses.....	290 50
	R. N. Isham, services as medical expert, witness.....	100 00
	Grey, Hewitt & Co., stenographers.....	161 62
September.	A. S. Trude, attorney, services.....	900 00
1887.		
March.	P. Goodwin, services and expenses.....	100 00
	R. N. Isham, services as medical expert, witness.....	50 00
	J. R. Dickinson, stenographer	16 22
April.	A. S. Trude, attorney, services and expenses.....	1,475 00

July.	J. R. Dickinson, copying.....	$31 02
	Grey, Hewitt & Co., stenographers.....	124 27
October.	P. McGrath, clerk superior court, transcript of record	97 00
	Appellate court, advanced fee	10 00
December.	Barnard & Gunthorp, printing...	200 00
	Do. do.	46 50
1888.		
February.	Do. do.	25 00
July.	Clerk's fees, appellate court transcript	41 51
September.	Barnard & Gunthorp, printing	73 00
	D. E. Devlin, stenographer.....	27 50
	G. Willard, disbursements	14 78
1889.		
February.	W. J. Connell, judgment, &c.....	7,811 99
	A. H. Taylor, clerk supreme court, costs..	11 25
	J. J. Healy, clerk appellate court, costs...	5 00
	P. McGrath, clerk superior court, costs ...	34 50
April.	Willard & Driggs, attorneys, services.....	1,000 00
	G. Willard, attorney, services...	500 00
		$13,328 94

(Endorsed:) Filed the 16th day of January, 1891. Wm. H. Bradley, clerk.

244 In the Appellate Court of Illinois, First District, October *September* Term, A. D. 1887.

THE PENNSYLVANIA RAILROAD CO., Appellant, *vs.* WM. J. CONNELL, Appellee. } Superior Court of Cook County.

Abstract of Record.

Placita.

Præcipe, filed January 19, 1882. Frank J. Smith, attorney for plaintiff.

Summons and return.

Declaration, filed Jauuary 25, 1882.

First count. For that, whereas, the defendant, before and at the time of committing the grievances hereinafter mentioned, was a common carrier, for the carriage and conveyance of passengers from Philadelphia, Pennsylvania, to Jersey City, New Jersey, for hire and reward to said defendant in that behalf; that on or
245 about December 16, 1880, at the special instance and request of defendant, plaintiff became a passenger in a regular train of defendant, to be conveyed thereby from Philadelphia, Pennsylvania, to Jersey City, New Jersey, for a certain fare and reward, theretofore paid by plaintiff to defendant; and thereupon it became the duty of the defendant to safely and securely carry the plaintiff

upon his journey, and protect him from assaults, injuries and insults.

Yet the defendant, not regarding its duty in that behalf, did not carry the plaintiff safely and securely and protect him from assaults, injuries and insults, but wholly neglected so to do; so that while the plaintiff was in said train, upon the journey aforesaid, conducting himself in all respects in a lawful, peaceful and orderly manner, a certain train conductor, then and there an agent and servant of defendant, together with a certain other agent and servant of defendant, without just cause or provocation, falsely pretending plaintiff had not paid said fare and reward to defendant, then and there violently and abusively assaulted the plaintiff, and with great force and violence laid hold of plaintiff and his garments, and roughly seized his person, and with abusive and insulting language, and with dangerous violence and brutal force, pushed, shoved and dragged plaintiff from his seat, and recklessly and with great danger to his life and person, pushed him against and out of the car door, and violently shoved and threw plaintiff down the steps upon the platform, and there held him until his luggage was ejected and train again put in motion.

By means whereof plaintiff was greatly hurt, injured, bruised and wounded, and greatly hindered and delayed in the prosecution of his journey and transaction of his business, etc.

246 Second count. Same as first count, except that it alleges:

That plaintiff, at the special request of defendant, became a passenger, etc., for a certain fare and reward theretofore paid by plaintiff to one Frank E. Moores, for the use and benefit of defendant, which said Moores, plaintiff alleges, was at the time of such payment duly empowered by the defendant to receive the same on behalf of the defendant, and thereupon, etc., etc.; and

That a certain train conductor, etc., etc., falsely pretending that the said payment to the said Moores did not entitle the plaintiff to be conveyed, etc., etc.

Third count. For that whereas, on December 7, 1880, plaintiff purchased a regular full-fare, first-class ticket, with coupons attached, entitling him to ride over the several railroads between Omaha, Nebraska, and New York city, and among other roads that of defendant from Philadelphia to Jersey City, New Jersey, said ticket, with coupons attached, having been so purchased by plaintiff at Omaha, from one Frank E. Moores, a regular ticket agent of the Wabash, St. Louis and Pacific Railway Company, which said company and their agent was duly authorized and empowered by said defendant, and other connecting lines of railroad, to sell such ticket and coupons; that among other coupons so attached to said ticket was one duly issued on account of and by authority of said defendant, entitling plaintiff to one first-class passage over the defendant's said road from Philadelphia to New York.

That defendant, in consideration of said payment to said agent, and in consideration of that proportion, or *pro rata* of the same, to which defendant was entitled by reason of said coupon being so

attached and issued, and which *pro rata* defendant subse-
247 quently received and still retains, undertook and agreed to carry plaintiff, as a passenger, from Philadelphia to New York, at any reasonable time thereafter that plaintiff might desire; and therefore it became the duty of defendant to carry said plaintiff on said journey, safely and securely and protect him from assaults, injuries and insults.

That pursuant to such contract, and by virtue of being the lawful owner and holder of said ticket and coupon, the plaintiff on the 16th of December, 1880, became a passenger in one of the cars of defendant from Philadelphia to Jersey City, for the purpose of taking passage between said points; that while such passenger, the defendant, by the conductor of said train not regarding its duty, refused to receive said ticket for such passage, and refused to carry the plaintiff over its said road to Jersey City, and did not protect him from assaults, injuries and insults, but wholly neglected so to do; and said conductor, together with a brakeman, also in the employ of defendant, assaulted plaintiff, etc., and with great and unnecessary force and unnecessary and reckless violence and indignity, shoved plaintiff along the platform and down the steps of the car, and in so doing seriously injured plaintiff's back; and thereupon said conductor continued to shove plaintiff away from said car, violently and with unnecessary force and indignity, holding plaintiff by the wrists for some time, until the brakeman obtained plaintiff's baggage, whereupon the train departed, leaving plaintiff at Tacony, Pennsylvania, a small way station.

Plaintiff further says said assault and ejectment was willful, wrongful and malicious, and wholly unprovoked, and without cause or justification; that defendant, with full knowledge of said assault and ejectment, has ratified and approved the same; that by
248 reason of said assault, etc., in addition to the injuries to his hand and back, plaintiff's feelings were greatly injured, etc., etc.

Fourth count. For that whereas, the defendant, etc., was the owner and proprietor of a certain railroad line for the carriage and conveyance of passengers and freight from Philadelphia, Pennsylvania, to Jersey City, New Jersey, for hire and reward to said defendant in that behalf; that on December 16, 1880, at the special instance and request of defendant, plaintiff became a passenger in a regular train of defendant, to be conveyed thereby from Philadelphia, Pennsylvania, to Jersey City, New Jersey, for a certain fare and reward, theretofore paid by plaintiff to defendant in that behalf; that while plaintiff was in said train upon the journey aforesaid, conducting himself in all respects in a peaceful and orderly manner, a certain train conductor, then and there an agent and servant of defendant, together with certain others, the agents and servants of defendant, without just cause or provocation, falsely pretending plaintiff had not paid said fare and reward to defendant, then and there with force and arms violently and abusively assaulted the plaintiff, and with great force and violence laid hold of plaintiff and his garments, and seized his person, and with loud and abusive lan-

guage and reckless violence and brutal force, pushed, shoved and dragged plaintiff from his seat and hustled him upon the platform, and from the platform to the ground, and there withheld and restrained him until his luggage was violently ejected by defendant's agents, and said train put in motion, endangering his limbs and body, and inflicting upon him shameful indignities.

By means whereof, etc., to the damage of plaintiff of $15,000, etc.

249 Plea of general issue, filed February 6, 1882. Willard & Driggs, attorneys for defendant.

Trial, June 19, 1882, before Hon. Elliott Anthony, judge, and a jury; verdict for plaintiff for $15,000.

New trial granted, September 30, 1882.

Trial, May 1, 1883, before Hon. Joseph E. Gary, judge, and a jury; verdict $15,000.

Motion new trial overruled, and judgment on verdict July 14, 1883.

Appeal to appellate court, first district.

Mandate of supreme court, reversing judgment, filed December 23, 1884, and cause redocketed.

Order. Leave to defendant to file additional pleas.

Pleas filed May 11, 1886, as follows, to wit:

And for a further plea in this behalf, by leave of the court, first had and obtained, the defendant says that the defendant, at the time when, etc., was a common carrier of passengers for hire, and, as such, was operating a certain line of railroad extending from the city of Philadelphia, in the State of Pennsylvania, to Jersey —, in the State of New Jersey, and was running and operating trains of passenger cars thereon.

That at the said time when, etc., to wit: on the 16th day of December, 1880, the said plaintiff was occupying a seat in a certain car in one of said trains going from said Philadelphia to said Jersey City. That whilst said plaintiff was thus occupying a seat, as aforesaid, he was duly, legally and properly called upon by the conductor of said train (who was then and there the agent and servant of said defendant) for payment of fare and reward as a pas-

250 senger. The said plaintiff thereupon offered and tendered to said conductor a certain ticket or coupon ticket which had been issued on the 7th day of December, 1880, by a certain other railroad company, to wit: the Wabash, St. Louis and Pacific Railway Company, in the city of Omaha, in the State of Nebraska, which said ticket purported, on its face, to entitle the said plaintiff to one first-class passage from said Philadelphia to said Jersey City, and tickets or coupon tickets of which said kind had been prior to, to wit: the 1st day of December, 1880, received by said defendant in payment and satisfaction of fare as aforesaid.

But said defendant avers that on, to wit: the said first day of December, 1880, it, said defendant, as it lawfully could or might do, requested and ordered the said Wabash, St. Louis and Pacific Railway Company to discontinue the sale of such tickets from and after

the receipt of said request. And the said Wabash, St. Louis and Pacific Railway Company, upon receipt of said request, thereupon afterwards and on, to wit: the 2d day of said December, 1880, notified said defendant that tickets of the kind aforesaid had been ordered off sale, thereby meaning to inform said defendant, and said defendant understanding that no more tickets of said kind would be sold.

Said defendant avers that it, said defendant, thereupon and on, to wit: the said 2d day of December, 1880, in good faith, believing that no more tickets of the kind aforesaid would be issued or sold by the said Wabash, St. Louis and Pacific Railway Company, instructed the conductors of defendant's said passenger trains, running between said Philadelphia and Jersey City, not to receive in payment and satisfaction of passage tickets of the kind aforesaid.

Said defendant avers that it had no knowledge or notice
251 of the issuance of said ticket previous to the said time when the same was offered in payment of fare as aforesaid, and at which said time the said conductor had no time or opportunity to ask for or obtain further or other instructions as to the receipt or rejection of tickets of the kind aforesaid.

Said defendant avers that said conductor, acting in good faith and under his instructions, received from said defendant on the 2d day of December, 1880, refused to receive from said plaintiff the ticket so as aforesaid offered by said plaintiff in payment of fare. And the said conductor thereupon requested of said plaintiff payment of fare other than by the surrender of said ticket which payment, other than by the surrender of said ticket, the said plaintiff refused.

Said defendant avers that said conductor thereupon stopped said train and asked said plaintiff to pay his fare or to get off said train. That the said plaintiff then and there refused to pay his fare, otherwise than by the surrender of said ticket, and then and there refused to get off said train; the same being then and there not in motion and at a regular station on said railway. That the said conductor gently laid his hands upon the plaintiff in order to remove him out of said car and from said train for the cause aforesaid, and because the plaintiff then and there wrongfully and unlawfully resisted the said conductor in that behalf and assaulted him and used violent and menacing language and jestures towards him and would then and there have remained on said train and in said car, the said conductor defended himself against the plaintiff, and he, the said conductor, did then and there defend himself against the plaintiff, and to remove said plaintiff and overcome his said resistance
252 and assault the said conductor called to his aid a brakeman then and there upon said train and an employé of said defendant, and the said conductor and brakeman then and there overcame the resistance and assault of said plaintiff and then and there put said plaintiff out of said car and off said train, and in so doing did necessarily and unavoidably a little bruise, wound and injure the plaintiff, but doing no unnecessary damage to the plaintiff on that occasion, which are the same supposed assaults, injuries and

insults in said declaration mentioned, and whereof the plaintiff has complained against the defendant; and this the defendant is ready to verify, wherefore *he* prays judgment, etc.

WILLARD & DRIGGS,
Att'ys for Defendant.

And for a further plea in this behalf by leave of court, first had and obtained, the defendant says that the plaintiff, just before the said time, when, etc., to wit, on the same day in the said declaration mentioned, with force and arms, etc., made an assault upon the said conductor and brakeman, who were lawfully attending to their duties as conductor and brakeman of said passenger train in said declaration mentioned, who were then and there the servants of the said defendant, and would then and there have beaten, bruised and ill-treated the said conductor and brakeman, if they had not immediately defended themselves against the said plaintiff: wherefore, the said conductor and brakeman, the said servants of said defendant, did then and there defend themselves against the plaintiff, as they lawfully might for the cause aforesaid, and in so doing, did commit the supposed trespasses in the said declaration mentioned; and so the defendant says, that if any hurt or damage then and there happened to the plaintiff, the same was occasioned by the said assault so made by the said plaintiff upon the said conductor
253 and brakeman, then and there servants of defendant, and in their necessary defense of themselves against the plaintiff. And this the defendant is ready to verify; wherefore, it prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

WILLARD & DRIGGS,
Attorneys for Defendant.

Replication filed May 19, 1886, as follows, to wit:

And the said plaintiff, as to the plea of the said defendant, to wit: the plea of the general issue, and whereof, it hath put itself on the country, doth do likewise.

And the said plaintiff, as to the first of the two pleas of said defendant, filed May 11, 1886, says:

That he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action; nevertheless, for replication in this behalf, the said plaintiff admits that the defendant, at the time when, etc., was a common carrier of passengers for hire, and as such, was operating a certain line of railroad extending from the city of Philadelphia to Jersey City, and was running and operating trains of passenger cars thereon, and admits that on the 16th day of December, 1880, the said plaintiff was occupying a seat in certain car in one of said trains, going from Philadelphia to said Jersey City, but plaintiff denies that whilst he was thus occupying a seat as aforesaid, he was duly, legally and properly called upon by the conductor of said train for payment of fare, and reward as a passenger, other than that he was called upon for a ticket, and plaintiff avers that upon being called upon for his

ticket by the conductor of said train, and whom said plaintiff admits was the agent and servant of said defendant, he, the said plaintiff, then and there duly offered and tendered to said conductor a ticket
254 which was not issued by any other railway company, except as agent of said defendant, but which was sold by said defendant to plaintiff, and for which said plaintiff had paid to said defendant the price of a full fare, first class, and unlimited passage on said train from said city of Philadelphia to said Jersey City. And said plaintiff admits that said ticket purported on its face to entitle the said plaintiff to one first-class passage from said Philadelphia to said Jersey City, and was one of a kind previously received by said defendant in payment and satisfaction of fare, as aforesaid, and as plaintiff avers, was one of a kind which for many years prior to said date, was received and recognized by said defendant, as entitling the bearer thereof to passage as aforesaid. And said plaintiff denies that said defendant lawfully ordered the discontinuance of the sale of such tickets, or that any notification of the Wabash, St. Louis and Pacific Railway Company did purport or mean to inform said defendant that no more tickets of said kind would be sold, and denies that said defendant so understood said notice, and said plaintiff admits that on the second day of December, 1880, the said defendant instructed the said conductors of said passenger trains running between said Philadelphia and Jersey City, not to receive in payment and satisfaction of passage, tickets of the kind aforesaid, but said plaintiff denies that said defendant so instructed its conductors in good faith, believing that no more tickets of the kind aforesaid would be issued, but on the contrary, the said plaintiff avers that said defendant gave such instructions to its said conductors in bad faith, wrongfully, unreasonably and maliciously and in utter and reckless disregard of the rights of the traveling public, and of the rights of any and all purchasers and holders of such tickets, and for the purpose of boycotting and inconvenienc-
255 ing any person who should travel over or patronize a rival and competing line of railroad, and for the wrongful and malicious purpose of maintaining and keeping up oppressive and excessive rates of fare between said Philadelphia and Jersey City, and to cause and compel the traveling public to travel over the said line of railway owned and operated by said defendant between said Philadelphia and Jersey City; and said plaintiff denies that said defendant had no knowledge or notice of the sale or issuance of said ticket previous to the time when the same was offered by said plaintiff to said conductor in payment of fare, or that at said time the said conductor had no time or opportunity to ask for or obtain further or other instructions as to the receipt or rejection of tickets of the kind aforesaid. And said plaintiff admits that said conductor, under instructions received from said defendant on said second day of December, 1880, refused to receive from said plaintiff the ticket so as aforesaid offered by said plaintiff in payment of fare, and demanded that said plaintiff should pay his fare again, that is, to pay it in cash to said conductor, after plaintiff had previously paid it to the defendant for the ticket aforesaid. But said plaintiff denies that

said conductor, in so refusing said ticket, and demanding fare, acted in good faith, but on the contrary, the said plaintiff avers that the said conductor in refusing the said ticket and demanding fare, as aforesaid, acted in bad faith, wrongfully and maliciously. And said plaintiff denies that after stopping said train the said conductor asked plaintiff to pay fare, or that said plaintiff at any time refused to get off said train, or that said conductor only in a gentle manner laid his hands upon plaintiff, or that said plaintiff wrongfully and unlawfully resisted the said conductor, or in any manner assaulted him, or used violent or menacing
256 language or gestures towards him, or would have remained in said car or on said train if said conductor had not defended himself against him, or that said conductor did defend, or have any occasion or necessity of defending himself against said plaintiff, or that to remove plaintiff from said train, or to overcome any resistance or assault upon or against said conductor, it was necessary to call to his aid a brakeman, or that said conductor and brakeman in putting said plaintiff out of said car and off of said train, used only such force as was necessary to overcome the resistance of said plaintiff, or in putting said plaintiff out of said car and off of said train, did necessarily and unavoidably only a little bruise, wound and injure said plaintiff, but doing no unnecessary damage to him, but on the contrary, the said conductor, in putting said plaintiff out of said car and off of said train, used violent and threatening language and gestures towards said plaintiff, and with said brakeman then and there wrongfully and maliciously assaulted plaintiff, in pursuance of the instructions of said defendant, and did then and there, with unnecessary and excessive force and violence, eject and remove said plaintiff out of said car and away from said train, in manner and form as alleged in plaintiff's declaration, and did thereby unnecessarily, wrongfully and maliciously bruise, wound and injure said plaintiff in manner and form as charged in his said declaration.

And this the plaintiff prays may be inquired of by the country, etc.

JOHN I. REDICK,
WILLIAM J. HYNES,
Att'ys for Pl'ff.

And the defendant doth the like.

WILLIARD & DRIGGS,
Att'ys for Defendant.

257 And the plaintiff, as to the second of the two pleas, filed by the defendant on May 11, 1886, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because, he says that the defendant at the time when, etc., of its own wrong, and without the cause by it in its plea alleged, committed said several trespasses in said plea mentioned, in manner and form as the plaintiff has above complained against the defendant.

And this the plaintiff prays may be inquired of by the country, etc.

JOHN I. REDICK,
WM. J. HYNES,
Att'ys for Pl'ff.

And the defendant doth the like.

WILLARD & DRIGGS,
Att'ys for Defendant.

Order, withdrawal of the plea of general issue.

Trial May 25, 1886, before the Honorable Kirk Hawes, judge, and a jury.

Order discharging jury from rendering a verdict.

Trial cause called for trial February 21, A. D. 1887.

Motion by plaintiff, to increase *ad damnum* to $25,000, allowed.

Bill of Exceptions.

Motion by plaintiff for order for repleader on the alleged ground that there are no material issues. Motion overruled; exception by plaintiff.

Motion by plaintiff for leave to withdraw replication to first special plea and for leave to file a demurrer. Motion overruled; exception by plaintiff.

258 Motion by plaintiff for leave to withdraw replication to second plea, and for leave to file a demurrer. Motion overruled; exception by plaintiff.

Motion by plaintiff for leave to open and close the case to the jury. Objection by defendant. Motion overruled; exception by plaintiff.

Motion by defendant for leave to open and close the case to the jury. Objection by plaintiff. Objection overruled; exception by plaintiff.

Counsel for defendant made an opening statement to the jury.

Counsel for plaintiff thereupon made an opening statement to the jury.

DEFENDANT'S EVIDENCE.

Benjamin F. Wilson.

Direct examination by Mr. WILLARD:

I reside at Camden, New Jersey, and am in the employ of the Pennsylvania Railroad Company as conductor. Have been constantly thus employed as passenger conductor since about 1871, between Philadelphia and New York. Before that I was baggage-master for the old Camden and Amboy Railroad Company. I know the plaintiff by meeting him on the train and seeing him here in the court-room. I first saw him, to my knowledge, after leaving Germantown Junction, on the train from Philadelphia to New York. I was conductor of that train.

259 Q. Did Mr. Connell offer you anything for his passage on that train?

A. Yes; he offered me a ticket and a five-dollar bill.

Q. Would you know the ticket if you were to see it, do you think?

A. I would know the issue of the ticket.

Q. Look at that (handing ticket to witness) and see if you recognize that as being the ticket which was offered to you at that time.

A. That is the same kind of ticket that was issued by the Wabash, St. Louis & Pacific railroad at that time. It is a first-class unlimited ticket. I think it was the one that was offered to me.

Q. Did you receive it for his passage?

A. No, sir.

Q. Why didn't you receive it?

A. Because we had orders from the company not to receive those tickets. We had orders to refuse to honor all tickets issued by or reading by the Baltimore and Ohio railroad.

Q. When did you receive those orders or instructions?

A. The orders were posted in the book. I don't know what date. The order was to refuse to honor all tickets issued by or reading by the Baltimore and Ohio railroad after January 10th. I could not say the date. It was put in the order book.

Q. From whom did you receive those orders at that time?

A. They were posted in the order book. The order was issued by L. P. Farmer, general passenger agent.

Q. What order book, Mr. Wilson, did you receive those instructions from?

A. There is an order book in the ticket-receiver's office, where they post all general orders to the conductors.

Q. What, if anything, did you say to the plaintiff with respect to his ticket not being good?

A. He handed me a ticket and a five-dollar bill; I looked
260 at his ticket and told him it was not good for his passage; that we had orders to refuse to honor all tickets issued by or reading by the Baltimore and Ohio railroad.

Q. State briefly what you then said to Mr. Connell, and what he said to you, in respect to the payment of fare.

A. Mr. Connell handed me the ticket and the bill, and I looked at Mr. Connell's ticket and told him it was not good; that we had orders to refuse all tickets issued by or reading by the Baltimore and Ohio railway, and I handed the ticket back to Mr. Connell. Mr. Connell seemed to be astonished that his ticket was not good; he said he bought the ticket in good faith, which I have no doubt he did. I told him the Baltimore and Ohio Company was running by another line, and, to the best of my recollection, Mr. Connell, I retaining his money, grabbed at my hand to get his money from my hand. He said he didn't propose I should steal his money. I told him I didn't intend to steal his money—that he could not take it from my hand—I would give it to him; and I straightened it out and gave it back to Mr. Connell. Mr. Connell got up out of his seat and passed up about the middle of the car. A gen-

tleman—his name, I think, was Erastus Brooks—was sitting there. He was talking to Mr. Brooks; Mr. Brooks didn't seem to be very friendly towards Mr. Connell. I went to the rear of the car and rang the bell after passing Wissinoming station. That was a signal to the engineer to stop at the next station. He stopped there. Mr. Connell was still standing up where Mr. Brooks was, and I asked Mr. Connell if he would pay his fare. He said he had paid his fare once and he didn't think—I can't say the exact words, but he didn't intend to pay it again. He was going to ride to New York. He bought that ticket in good faith and he was going to ride to New York on it.

261 Q. He was going to ride to New York on the ticket?

A. Yes; after the train stopped I asked Mr. Connell if he would pay his fare; he refused; I took him by the hand and led him to the door. At the end of the car he placed his right shoulder against the jamb of the door. Uberoth came behind him and released him from that, and he went out on the platform. There he got his hand loose, his right hand; he got hold of the rail. Uberoth released his hand from that. I still held on to his left hand, going down the steps backwards, and Mr. Connell following me. He stepped down onto the platform; he demanded me to let him go. I held him about half a minute. I told Uberoth to go into the car to get Mr. Connell's things, and he did so. He brought them out and set them down by his feet.

Q. You may state whether or not he was requested to pay his fare when you first refused to accept the ticket?

A. I told him I could not accept his ticket for his passage.

Q. And that you would have to collect his fare?

A. Collect his fare.

Q. And he refused to pay?

A. Yes, sir.

Q. What did he say about riding to New York on that ticket, if anything?

A. He said he bought the ticket in good faith, and he did not propose to pay his fare again; he was going to ride to New York on it.

Q. Who was on the car with you at that time, assisting?

A. Mr. Uberoth.

Q. What capacity was he acting in?

A. As brakeman.

Q. Which side of the car was Connell sitting on?

A. On the right-hand side, going east, the direction the train was going.

262 Q. Whereabouts was Connell sitting with reference to the rear door of that car?

A. About the second or third seat from the rear of the car.

Q. What was Mr. Connell's manner when you informed him that his ticket was not good?

A. Well, Mr. Connell raised up from his seat, after handing back his ticket, and I retaining his five-dollar bill, he appeared to be a little bit excited.

Q. What was his tone of voice?
A. Well, it was louder than it was before.
Q. What was it before?
A. Why, a very mild tone.
Q. When did you say it became a little bit excited?
A. When he grabbed for the five-dollar bill.
Q. What was his tone of voice then?
A. It was louder than it was before.
Q. Was it sufficiently loud that it could be heard through the car?
A. It was loud. Other people could hear him.
Q. Where was the ticket-receiver's office, through whose book you received those instructions?
A. Mr. Stackhouse and Mr. Osborne; one is at Jersey City and one is at Philadelphia.
Q. Do you remember at which place it was that you received the orders?
A. I received them at both; we signed them at both.
Q. Did you take a copy of those orders; did you copy them from the book?
A. No, sir.
Q. Were they given to you in writing?
A. They were in writing.
Q. Have you a copy of them?
A. No, sir.
Q. Would you recognize a copy if you were to see it?
A. I think I would.

263 (Mr. Willard hands paper to witness.)

Mr. Hynes: Have you got the original, Mr. Willard? I object to his handing a copy to the witness until the original is accounted for.

Mr. Willard: You haven't the book with you from which that order was given?
A. No, sir.
Q. Then you have no evidence of what it is except from your recollection?
A. Yes, sir.
Q. Do you remember what day this occurred on; the day Mr. Connell was put off the train?
A. It was December 16, 1880.
Q. What day was it that you first received the instructions or orders which you refer to?
A. I could not say the date; it was some time in December.
Q. Is there anything you can refresh your recollection from so as to state it?
A. No, not the date of it.
Q. About how long had you been acting under those instructions?
A. From the 10th; we refused to honor all tickets issued by or reading by the Baltimore and Ohio railroad after December 10th.

Q. Do you know what the date of the instruction was?

(Objected to by counsel for plaintiff.)

Q. You may refresh your recollection upon that point, and I will ask to have you recalled to state when you first received those instructions?

Mr. HYNES: I object to his recalling him after he has refreshed his recollection on the subject.

Counsel for defendant offered in evidence the ticket referred to, dated December 7, 1880, as follows:

264 Ticket read in evidence as follows:

EXHIBIT "A."

(Face.)

Wabash, St. Louis & Pacific Railway.

Good for one first-class passage to point named in coupon attached when officially stamped, subject to the following conditions:

Jan. Feb., Year. Mar., 1880. Apr., 1881. May, 1882. June, 1883. July, Aug., 1884. Sept., 1885. Oct., Nov., Dec.,

In selling this ticket for passengers over other roads this company acts only as agent for them, and assumes no responsibility beyond its own line. The holder hereof in consideration of the reduced rate at which this ticket is sold, agrees with the respective companies over whose roads such holder is to be carried, to use the same on or before the date as cancelled by punch in the margin of this contract ticket, and the holder hereof failing to comply with this agreement, either of said companies may refuse to accept this ticket or any coupon thereof and demand the full regular fare, which the holder agrees to pay. None of the companies represented in this ticket will assume any liability on baggage, except for wearing apparel, and then only for a sum not exceeding $100. The coupons belonging to this ticket will not be received for passage if detached.

If this contract and its coupons bear no cancellation or stamp, other than the ordinary dating stamp, the holder is entitled to all the privileges accorded passengers holding regular unlimited first-class tickets.

C. K. LORD,
Gen'l Ticket Agent.

O 145.

Issued by Wabash, St. Louis & Pacific R'y, on account of Pennsylvania railroad, one first-class passage, Philadelphia to New York. This check is not good if detached. W., St. L. & P., O. & M., M. & C., B. & O., P., W. & B., P., New York.

5

Day of month.	
	17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31,
	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,

O 145.

(Back.)

F. E. Moores, City Office, Omaha, Ticket Agent, W., St. L. & P. R'y, Dec. 7, 1880.

F. E. Moores, City Office, Omaha, Ticket Agent, W., St. L. & P. R'y, Dec. 7. 1880.

265 Cross-examination:

Q. Mr. Wilson, if this ticket had been presented to you before the 10th you would have honored it, would you, under your instructions?

(Objected to by counsel for defendant.)

The COURT: I don't see any point in the question; the pleadings admit he had a valid ticket, and they had orders not to receive them, and he was put off the train. What difference does it make whether he would or would not receive it?

Mr. HYNES: I want to show by the witness that they received this same ticket in reply to what Mr. Willard has said to the jury that the date of the ticket stamped it with suspicion. I want to show by the witness himself that he would have received this same ticket if it had been presented before the 10th.

The COURT: I shall not allow any evidence to come in here to contradict or support anything said by either counsel in his opening. I don't see any point to it.

(To which ruling of the court counsel for plaintiff then and there duly excepted.)

Mr. HYNES: Mr. Wilson, you handed the ticket back to Mr. Connell, did you, as soon as you looked at it?

A. I did; yes, sir.

Q. Retaining the five-dollar bill?

A. Yes, sir.

Q. What time elapsed between the time of your handing the ticket to him, and your handing the five-dollar bill, as you say?

A. Well, I could not say the exact minutes.

Q. Give us your best recollection. It was not five minutes, was it?

A. No, sir, it was not that time.

266 Q. How many minutes?

A. I don't suppose it was over a minute or a minute and a half.

Q. The conversation that you had with him about the quarrel between the Pennsylvania Company and the Baltimore and Ohio Company that you have referred to, was between the handing back of the ticket and the handing back of the money, was it?

A. I spoke about the Pennsylvania and the Baltimore and Ohio, yes, sir.

Q. You speaking of that quarrel, what did you say to him about the quarrel between the Baltimore and Ohio and the Pennsylvania Company?

(Objected to by counsel for defendant.)

The COURT: The objection is sustained; he didn't use the word "quarrel." He said the Baltimore and Ohio did their business by another line.

Mr. HYNES: Did you use the word quarrel?

(Objected to; objection sustained; exception.)

Q. Did you use the word fight between the Baltimore and Ohio and Pennsylvania Company?

(Objected to; objection sustained; exception.)

Q. Did Connell say to you that he did not have anything to do—in that conversation—with the fight between the Baltimore and Ohio or the quarrel between the Baltimore and Ohio and the Pennsylvania Company?

(Objected to.)

The COURT: I sustain the objection upon the ground that it is entirely immaterial whether there was any quarrel between them or not.

(Exception.)

267 Mr. HYNES: Mr. Wilson, before you handed the bill back, you say that he grabbed for the five-dollar bill in your hand?

A. Yes, sir.

Q. How did you hold it in your hands when he grabbed for it?

A. I had it in this hand (indicating), closed up.

Q. Did you have it folded?

A. No, I crushed it up in my hand.

Q. He handed it to you open, didn't he?

A. Well, I could not say whether it was quite spread open or not.

Q. And you crushed it up in your hand?

A. I did; shut my hand onto it.

Q. Before he grabbed for it?

A. I don't think I did.

Q. When he grabbed for it?

A. Yes, sir.

Q. When he grabbed for it and before you crushed it up in your hand to hold it, will you tell me how you held it in your hand at the time he grabbed for it?

A. I think I had it in my hand in this way (indicating).

Q. And you pulled your hand away, did you?

A. When he grabbed for it, of course I naturally pulled my hand back.

Q. He grabbed for it?

A. He grabbed for it; yes, sir.

Q. He did not get it?

A. No; he did not.

Q. He didn't touch you?

A. I think he touched my hand.

Q. Do you think so?

A. I do.

Q. Show me how?

A. I could not say how.

Q. Yet he grabbed for the money?

A. He grabbed for the bill.

268 Q. You think he touched your hand?

A. I think he did.

Q. You closed up on the money?
A. I closed up on it, yes, sir.
Q. You knew that gesture was for the money, didn't you?
A. I knew he was reaching for the money, yes, sir.
Q. That was all that was done, wasn't it, at that time?
A. I told him that he could not take the money, and I straightened it out and gave it to him.
Q. Did he make any other attempt to get it?
A. Not after that.
Q. Then you straightened it out?
A. I did, sir.
Q. And handed it back to him?
A. I did, sir.
Q. What did you do then?
A. I went back to the rear end of the car, sir.
Q. You went on collecting tickets and fares?
A. I don't think I collected a ticket after that. I could not say; I don't think I did.
Q. Didn't you testify on the other trial you went on collecting tickets?
A. I don't think I collected a ticket after that.
Q. What did you go back to the rear part of the train for?
A. To wait until after passing Wissinoming station, so I could ring the bell to stop at the next station; that is a small station without any shelter.
Q. Where were you with reference to the Wissinoming station at that time?
A. Before we got to Wissinoming I was talking to Mr. Connell, and Mr. Connell went up to talk to Mr. Brooks.

Q. How far were you from Wissinoming at the time you
269 handed the bill back?

A. Well, I could not say the exact distance.
Q. Was it a mile or two miles?
A. I could not say.
Q. How far were you from the station of Tacony?
A. The distance from Tacony to Wissinoming is about a mile and a half.
Q. This all took place before you got to Wissinoming?
A. Yes, sir.
Q. You cannot tell whether half a mile or three miles from there; now, how much time elapsed from the time you handed back the bill before you got to Tacony?
A. I suppose the time we had the conversation in regard to the ticket; I did not time myself; I could not say.
Q. But you can tell; you are a railroad man and know the distance, and you travel and keep pretty close note of the time, don't you? Come now, tell?
A. I could not tell the exact time.
Q. You can tell better than anybody else, can't you, Mr. Wilson?
A. I could not tell the exact time.

Q. I don't ask for the exact time; give me your best recollection. Don't look at him; look at me. Give me your best recollection.

A. Well, I can guess at it—from three to four minutes. That is my best recollection; the best I can guess at. I could not say the exact time.

Q. You waited until the train stopped, did you, before you went to Mr. Connell again?

A. I did, yes, sir.

Q. What did you do when you went up to him—take hold of him?

A. I asked him again if he would pay his fare, and he refused to do it.

Q. Then you took hold of him with both hands?

A. Yes, sir.

270 Q. You took hold of both his hands?

A. I did.

Q. When you got out you say you held on to him for about thirty seconds?

A. Yes, sir.

Q. He asked you to let go?

A. He did.

Q. And you held on to him for about thirty seconds after he asked you to let go?

A. I held on to him about thirty seconds on the platform, yes, sir.

Q. After he asked you to let go?

A. He asked to let go as soon as he got on the platform, sir.

Redirect examination by Mr. WILLARD:

Q. For what purpose did you hold on to him after he was off the step?

A. Thinking he might attempt to get on the train again.

Q. What station was this at which Connell was put off?

A. Tacony, State of Pennsylvania.

Q. How far out of West Philadelphia?

A. About eleven miles.

Q. What kind of station was this?

A. It was one of these Centennial buildings, moved out there and rebuilt. Tacony is now in the 23d ward of Philadelphia.

Q. This Centennial building was used as a railroad station?

A. Yes, sir.

Q. Was it a regular station?

A. Yes, sir.

Q. What number of trains were passing there per day, or stopping there?

A. I don't know; a great many local trains.

Q. Do you know whether there was a train stopping there either way that afternoon after this occurrence?

A. There was a 2.15 train coming out of the station called

271 Kensington that went to Trenton ahead of the 3-o'clock train

that picks up passengers for New York. Kensington is in Philadelphia now. It was formerly separated from Philadelphia.

Q. Did Philadelphia passengers take passage at Kensington for New York?

A. Yes; that used to be the principal depot at one time for New York.

Q. That train took the passengers to Trenton?

A. Yes, sir; where they could change cars and go to New York.

Q. What time would they reach New York?

A. I think the schedule was then about 5.15—yes, 5.15.

Q. What was the leaving time of your train from Philadelphia?

A. One o'clock and thirty-five minutes.

Recross-examination by Mr. HYNES:

Q. Did Mr. Connell, when he asked you to let go, say that he was not going on your train? Don't you remember—that he was not going back in the car?

A. He said something like that; I cannot say.

Q. I don't care about the exact words. I forgot to ask you, Mr. Wilson, whether you had had considerable experience in bouncing passengers from trains?

(Objected to; objection sustained.)

Q. How stout a man are you? Strong enough to pull seats up from their fastenings?

(Objected to by counsel for defendant.)

Mr. TRUDE: That is buncombe and you know it.

Mr. HYNES: Didn't you so testify on the last trial, that you pulled the seats up from their fastenings?

272 Mr. TRUDE: He didn't state anything of the kind.

Mr. HYNES: I leave it to him to say whether he did or not.

Mr. TRUDE: It is the policy of these gentlemen to drag in a great deal of buncombe and charge it to us; we are trying to follow the law.

The COURT: The objection is sustained.

(Exception by plaintiff.)

E. R. J. Uberoth.

Direct examination by Mr. TRUDE:

Q. What is your occupation?

A. Passenger conductor.

Q. What was your occupation at the time the occurrence took place that has been referred to here?

A. Passenger conductor, but acting as brakeman on that train on that day.

Q. With what road at that time were you connected?

A. Pennsylvania railroad.

Q. Do you remember responding to a request of any one on the

16th of December, 1880, or answering some person's call? You remember an occurrence that took place on the train, do you not?

A. Yes, sir.

Q. In your own way, go on and tell these twelve gentlemen what did take place?

A. On the 16th December, 1880, train No. 22, which left West Philadelphia at 1.35 for New York, Mr. Connell was a passenger on; the first stop for that train was Germantown Junction, which is about four and a half miles from West Philadelphia; after
273 leaving Germantown Junction Mr. Wilson, the conductor of the train, commenced to examine tickets and collect the fares; when he came to Mr. Connell he was consuming more time than usual with a passenger; Mr. Wilson shaking his head, the conversation which was carried on was in a low, ordinary tone of voice, which I could not hear; I was standing at the rear door of the car, Mr. Connell was sitting probably in the second or third seat from the rear end. The first interruption there was, was when Mr. Connell raised up in his seat and grabbed Mr. Wilson by his hand, or attempted to grab him, and accusing him of, or saying words that "I don't propose for you to steal my money;" that "I have bought this ticket and I am going to ride to New York on it." When we got to Wissinoming, or before we got to Wissinoming Station, Mr. Wilson gave the signal to the engineer to stop at the next station, and when Mr. Connell saw what was to be done he raised up and went ahead in the middle of the car, talking to a gentleman there by the name, as I afterwards learned, of Mr. Brooks. When the train came to a stop at Tacony Mr. Wilson asked Mr. Connell if he would pay his fare; he said, "No, I have paid it once, or have a ticket here, which I am going to New York on." Mr. Wilson told him that he would have to put him off, and he grasped Mr. Connell by his hands and brought him back towards the rear end of the car; the door was closed; I was standing right there; I opened the door for Mr. Wilson to pass out with Mr. Connell, holding on his hands, and as he came to the end of the car Mr. Connell braced himself with his right shoulder against the jamb of the door; I stepped behind Mr. Connell and released him from the hold he had taken with his shoulder; he passed out onto the platform of
274 the car, Mr. Wilson descending the steps backwards, and as Mr. Connell got, I think, about on the middle step—there is three steps to it—Mr. Connell got his right hand away from Mr. Wilson and grasped the hand railing; then Mr. Wilson was standing on the platform of the station, which is even with the rails—not raised, but level with the rails. I placed my hand over Mr. Connell's and released his hold from the iron railing; after his hold was released there he stepped down upon the platform—that is, the platform at the station, the station platform; Mr. Connell requested Mr. Wilson to release him, as he was off the train; he done so; I was then requested to re-enter the car and get his overcoat and his satchel, which I did, and brought them out, and placed them on the platform, and asked him if it was his, and he said, yes. I think that is about the whole of it.

Q. Were there any persons around the station platform at the time besides Mr. Wilson, yourself and Connell?

A. There might have been some around; I could not say; probably there was, because there is always some one around.

Q. State what was the first act on the part of either Wilson or Connell that arrested your attention there; any act approaching violence, or anything like it?

A. The first real action which took place was when Mr. Connell raised up out of his seat and grabbed Mr. Wilson's hand, saying: "I don't propose for you to steal this money."

Q. Was that the first word of an offensive nature that you heard from anybody?

A. Yes; because before that the conversation was carried on in a low tone of voice; I could not hear what they said; merely I see Mr. Wilson shake his head.

275 Q. Did he shake his head in a blood-thirsty, sanguinary manner, or was it——

(Objected to; objection sustained.)

Q. He merely shook his head?

A. Yes, sir.

Q. What else was done there?

A. After that Mr. Connell was loud, rather boisterous, and in his manner excited.

Q. Do you know what he went to Mr. Brooks for?

A. Not any more than probably trying to get sympathy.

(Objected to by counsel for plaintiff.)

The COURT: Not unless he knows of his own personal knowledge.

Mr. TRUDE: Do you know what he said to Brooks?

A. No, I did not hear what he said to Mr. Brooks.

Q. How many times was he asked to pay his fare?

A. Well, Mr. Trude, I could not say to the exact amount, two or three times, probably.

Q. Do you know whether he had any money with him to pay his fare or not?

A. He had money; the denomination of it I could not say.

Q. Did he make any claim that he was unable to pay his fare to New York?

(Objected to by counsel for plaintiff.)

The COURT: If he said anything in relation to inability to pay his fare?

Mr. TRUDE: Did he say anything in relation to his ability or inability to pay his fare?

A. He did not.

Q. Do you know what the fare is from that point to New York city?

A. I think it is $2.36 or 38, from Tacony to New York.

276 The COURT: What was it at that time?

A. At that time, and from West Philadelphia, $2.50.

Mr. TRUDE: How much time elapsed from the period when you saw Mr. Wilson shake his head up to the time of the reaching of this station, Tacony?

A. Well, it would be more or less guess-work; the running time of that train is nineteen minutes from West Philadelphia to Tacony; about nine minutes of that is consumed in running to Germantown Junction; that would leave ten; ten minutes from Germantown Junction to Tacony; no, I don't think it was over six minutes from the time he came to Mr. Connell until the train stopped at Tacony; that is the whole transaction.

Q. Did you learn at this time that Mr. Connell was a lawyer?

A. I did not; no, sir.

Q. From his going to anybody and asking them their names?

A. No, I had no intimation that he was a lawyer.

Q. Did you learn that he was a lawyer from his conduct at that time?

A. No, sir.

Q. From any of his acts were you apprised of the fact that he was a lawyer making material for a lawsuit?

(Objected to; objection sustained.)

Q. Any act that you can refer to?

(Objected to; objection sustained.)

Q. You don't know what he said to Mr. Brooks, do you?

A. I do not, because I could not hear it.

Q. What was the manner of Mr. Wilson, with reference to being orderly and gentlemanly, with a duty, of course, to perform, or whether he was grabbing hold of things, and wrecking them and tearing them up?

277 (Objected to by counsel for plaintiff.)

Mr. TRUDE: His general demeanor is what I want?

The COURT: You may state his general deportment during the transaction.

A. Mr. Wilson was perfectly cool and gentlema-ly-like until it was necessary for him to take hold of Mr. Connell.

Q. Then how did he do that?

A. He took hold of Mr. Connell and put him off the train—with the idea of putting him off the train.

Q. In doing so did he beat or bruise him?

A. No, sir.

Q. Did you do it?

A. No, sir.

Q. Did you run him against anything?

A. No, sir.

Q. When you unloosened his hand how did you do it?

A. I placed my hand over his own and loosened his hold in this way (illustrating).

Q. With the intent to loosen his hands or to hurt him?

A. Not with the intent of hurting him; no, sir.

Q. When Mr. Connell used the word "steal," applying it to Mr. Wilson, did he appear to resent it in any way?

A. Mr. Wilson resent it? no, sir.

Q. How did he act? Peaceably, quiet or otherwise at that time.

(Objected to as repetition.)

Q. At the time of the application of this word "steal"?

A. Are you alluding to Mr. Wilson's manner or Connell's?

Q. Mr. Wilson's manner at the time of the application of that expression to him?

A. No, sir.

278 Q. Did he appear to notice it?

A. No, no; he was not rude at all.

Q. Did he make any reply at the time Mr. Connell used the word?

A. Something like this, that he could not take the money in that way, but he would give it to him; and he did give it to him; he handed it back to him.

Q. That is, Wilson handed it back to Connell?

A. Handed back the money to Mr. Connell.

Q. Do you know whether Connell was asked for the payment of his fare after the train stopped at Tacony?

A. He was.

Q. You heard that, did you?

A. I did; yes, sir.

Q. How did the conductor ask him; in what way?

A. He merely asked him if he would pay his fare.

Q. And what did Connell say?

A. He said he would not; he refused to pay it.

Q. This was after the train had stopped?

A. After the train had stopped; yes, sir.

Cross-examination.

By Mr. HYNES:

Q. Didn't he say he paid it once?

A. That is what I said.

Q. He said that, didn't he, he had paid it once, and there was the ticket to show for it?

A. I don't remember, Mr. Hynes, if he just made that remark at that time, but the remark was made in the——

Q. He made that remark?

A. He made it some time or other; yes, sir.

Q. Where do you say Wilson was at the time you broke Connell's hold?

A. Wilson was down on the station platform.

279 Q. And where was Connell?

A. He was standing, I think, about on the middle step.

Q. That would be what we would call the second step?

A. Yes, sir; three steps; the middle step.

Q. When you broke his hold?

A. Yes, sir.

Q. Is that right?

A. That is right; yes, sir.

Q. I notice you used the word, now released his grasp, or loosed his grasp; you used the phrase before, that you broke his hold; do you mean to say you did it very gently?

Mr. TRUDE: You have no right to assume what he said before, if he said it; you may ask the witness whether he said it.

Mr. HYNES: At that time did you not say before Judge Gary, "At the time I broke his hold I think Wilson must have been on the station platform"?

A. Yes, sir.

Q. When you speak of the station platform, will you tell the jury what you mean by the platform; was there any platform?

A. The station platform; yes, sir; in other words, planked over level with the rails of the railroad.

Q. Like a street crossing?

A. Not raised, we understand them as the platforms; I suppose you differ.

Q. Just like a street crossing?

A. Yes, along the rails; along the track.

Q. That is about twenty inches, is it, from the step, from the lower step; have you ever measured?

A. Well, about eighteen inches. I will not split inches with you.

Q. From the lower step down to the platform was about eighteen inches?

A. Yes, sir.

280 Q. Let me see what you mean to be understood as saying, Mr. Uberorth, when you say Mr. Connell grabbed for that five-dollar bill?

A. Yes, sir.

Q. Did he get hold of it?

A. He did not; no.

Q. Did he take hold of Wilson in any way?

A. Well, he made a grab like this (illustrating) with his hand where the money was.

Q. Will you say he touched his hand?

A. No; I won't be positive about him striking the hand.

Q. He grabbed for the money?

A. He did.

Q. That was all?

A. Yes, sir.

Q. You say that about six minutes elapsed before he was put out at Tacony, is that your recollection of the time?

A. From the time that Mr. Wilson came to Mr. Connell, that is when he approached him in the car at first, from that time until this train stopped at Tacony, I should judge was about, probably, six or eight—six or seven minutes; somewhere about that.

Q. How much time elapsed between the time of handing back the money and the stopping of the train at Tacony? Mr. Wilson says that was about a minute and a half.

A. Well, I should judge it was probably about two minutes—two minutes or three minutes, somewhere around there.

Q. During that time where was the conductor?

A. He was in the back part of the car.

Q. What was he doing?

A. He rung the bell for the engineer to stop.

Q. He was not ringing the bell all the time for that three minutes; what did he do besides ringing the bell in that interval?

A. He didn't do anything that I remember.

281 Q. Did he talk with you about it?

A. I don't think there was a word passed between him and me.

Q. He stood there doing nothing until he rung the bell?

A. Yes, sir.

Q. He did nothing further until he went up to Mr. Connell to put him off?

A. No; I don't think so.

Q. How far was Connell from him when the train stopped?

A. Well, Mr. Connell was in about the middle of the car; he was standing by Mr. Brooks, talking to him.

Q. Then the conductor started for him?

A. He went up to Mr. Connell; yes, sir.

Q. He took hold of him right there, didn't he?

A. He first requested, or asked him, if he would pay his fare. He refused.

Q. And then the conductor took hold of him by both hands to put him out?

A. Yes, sir.

Q. Then he was about the middle of the car at the time he took hold?

A. Yes, sir.

Q. Do you say you saw the transaction from the time that the conductor went up to him?

A. Yes, sir.

Q. If you did, tell us what occurred up to the time that he reached for the money; did you see him hand the conductor the ticket?

A. I won't be positive if I seen him hand him the ticket; he certainly handed him the ticket.

Q. Did you see the conductor hand Mr. Connell the ticket?

A. That was handed back.

Q. Did you see him hand him back the ticket?

A. Yes, sir.

282 Q. What time?

A. Just about the time that he made a grab for the money.

Q. Before or after?

A. It was so close together there was very little difference between them.

Q. Can't you tell whether it was before or after?

A. Well, I think Mr. Wilson handed him back his ticket—or

about at the same time when he handed back his ticket Mr. Connell reached for his money, or made a grasp for his money.

Q. Did you not testify before Judge Gary and before Judge Anthony that he handed back the ticket and the money together?

A. Well, that is just what I am trying to tell you now.

Q. That the conductor handed back the ticket and the money together?

A. Yes, sir.

Q. Is that what you are trying to tell me now?

A. That is just what I am trying to tell you.

Q. Is that what you mean when you say that the conductor handed him back the ticket about the time he grabbed for the money?

A. Yes, sir.

Q. Then it was after he grabbed for the money that he handed it back, wasn't it?

A. After he grabbed for the money.

Q. Yes?

A. I think so.

Q. You think so, I am talking about your recollection?

Mr. TRUDE: That is what he is giving you, I submit.

Mr. HYNES: Is that what you mean, that that is your memory? Don't try to square your testimony?

A. I am not trying to do that.

Mr. TRUDE: I object to that remark of counsel's.

283 A. I am trying to testify to the best of my recollection, and the time being so close together.

Mr. HYNES: Did you not distinctly state before his honor, Judge Gary, or before his honor, Judge Anthony, in the trial of this case, when your attention was called to Wilson's testimony, that he handed the ticket back before he grabbed for the money and did not hand them back together; did you not distinctly say that you differed from Wilson on that point?

A. Well, that is the way I have seen it.

Q. Then, what you say now, what you saw was his handing the ticket and money back together to Connell?

A. Yes, sir.

Q. Did you get down on the platform after Connell got down?

A. Yes, sir.

Q. Did you see the conductor hold onto him there, after he got off?

A. Yes, sir.

Q. Did you hear Mr. Connell ask him to let go?

A. I think I did.

Q. And the conductor held onto him after that?

A. Oh, he released him almost on the request.

Q. Do you say that you recollect that he held onto him after he asked him to let go?

A. No; I do say that he released him. He didn't hold onto him any length of time at all.

Q. Do you say that he held onto him at all after he got down on the platform and asked to be let go?

A. Yes, sir.

Q. He did?

A. He had hold of his hands.

Q. Did you not testify both before his honor, Judge Anthony,
284 and before his honor, Judge Gary, and before his honor, Judge Hawes, here, on the last trial, that he did not hold onto him at all?

A. Oh, I don't remember; I don't think that I testified anything like that.

Mr. TRUDE: How is that material, anyway?

Mr. HYNES: On the last occasion the witnesses were separated, were they not?

A. Yes, sir.

Q. You were not in the last time when Wilson testified?

A. No, I was outside.

Q. And did you not testify on the last trial, before his honor, Judge Hawes, that Wilson did not hold onto him at all after he got down on the platform?

A. What I mean holding onto him at all is, any length of time.

Q. Didn't you so testify?

A. I don't think I did, Mr. Hynes.

Q. How much do you weigh at this present time?

A. Two hundred pounds; at that time, 180.

Q. Had you been in training?

A. We don't do that down east.

Rufus N. Pile.

Direct examination by Mr. WILLARD:

Q. What is your business at the present time?

A. I am rate division clerk in the passenger department of the Pennsylvania railroad, Philadelphia.

Q. How long have you occupied that position?

A. Since June 1, 1873.

Q. What are your duties in that position—what do you have to do?

A. Well, I make up the through passenger rates, and do other general work about the office under the supervision of the general passenger agent.

285 Q. Does your office have anything to do with reference to issuing instructions to ticket-receivers or passenger conductors?

A. Yes, sir.

Q. Were you occupying your present position in December, 1880, and prior thereto?

A. Yes, sir.

Q. You may state whether any instructions or orders were issued by your department to ticket-receivers or conductors with reference to coupon tickets reading by the way of the Baltimore and Ohio on or about December 1, 1880?

A. Yes, sir; such orders were issued.

Q. Were those in writing, those orders?

A. Yes, sir.

Q. Have you the original or letter-press copies of those orders thus issued?

A. I have a letter-press copy of them.

Q. Will you please produce them?

A. (Witness produces letter-press copy book, and indicates the order.)

Q. What book is this which you have handed to me as containing a letter-press copy of the order which you refer to?

A. One of our regular impression books.

Q. Kept in your office?

A. Yes, sir.

Q. And in which orders of this and other kinds are kept in regular order as they were issued?

A. Yes, sir.

Q. Does this copy purport to be entered in the regular order of its date in this book?

A. Yes, sir.

(Counsel for defendant offered said order in evidence from said letter-press copy book.)

Judge SMITH: We object to it on the ground that it is a letter-press copy, without accounting for the original.

The COURT: In a legal sense it is not admissible until the original is accounted for.

286 Judge SMITH: We waive the objection to the introduction of the copy.

The COURT: It goes in then. Read it.

Mr. WILLARD: You may read the order, Mr. Pile.

A. The order is dated December 1, 1880; "F. G. Osborn, Jersey City; Frank H. Taylor, Trenton, New Jersey; James S. Stackhouse, West Philadelphia" (those were ticket-receivers): "Issue the following instructions to conductors: Tickets issued by the Baltimore and Ohio Railroad Company, or tickets issued by other companies, via the Baltimore and Ohio railroad prior to December 2d from points in the South and West, may be honored to December 10th, but after that date you will refuse to accept any coupons of such issue. Answer. (Signed) L. P. Farmer."

Q. What was Mr. Farmer's position at that time?

A. He was general passenger agent of the Pennsylvania railroad.

Q. Did the issuance of orders of that kind properly belong to his department?

A. Yes, sir.

Q. You may state, Mr. Pile, whether on or about the 1st day of December, 1880, your department received from George H. Daniels,

ticket agent of the Wabash Railroad Company at St. Louis, any telegram with reference to coupon tickets of the kind in question?

(Objected to by counsel for plaintiff as irrelevant.)

The COURT: I suppose it would have a bearing upon the question as to whether they acted in good faith in excluding the plaintiff from the cars, holding one of those tickets.

287 Judge SMITH: That is on the question of damages; they don't claim to hold the affirmative on the question of damages; I merely object now that it is not competent at this stage of the case.

The COURT: Possibly that should come in in rebuttal. Have you any other idea save showing the good faith of the company in giving these instructions?

Mr. WILLARD: That is substantially the theory.

The COURT: That will be on the question of any damages, aside from actual damages.

Mr. WILLARD: This evidence is of the same character as that of the conductor, with reference to receiving his orders, and bears upon that question.

The COURT: To that they did not object. You probably will have the right to recall this witness by way of rebuttal as bearing upon the question of any exemplary damages, vindictive damages. In reference to any actual damage, I suppose sustained by the party, that is, his fare from Philadelphia to New York, this would not cut any figure, would it?

Mr. WILLARD: It may be it would more properly come in by way of rebuttal; if the court will not allow us to put it in evidence at this point.

The COURT: I sustain the objection to it now.

(Exception by defendant.)

Mr. WILLARD: We offer to show your honor, that such a telegram was received, and that this is the telegram thus presented. (Referring to paper marked Exhibit "A.")

The COURT: That is received from the agent of the Wabash road?

Mr. WILLARD: From George H. Daniels; yes, sir.

288 (Offer objected to; objection sustained; exception by defendant.)

Mr. WILLARD: In furtherance of that, your honor, to make our offer of proof safe, I will ask the witness, Was any communication sent by your department to Mr. Daniels upon that subject on or about December 1, 1880?

(Objected to; objection sustained; exception by defendant.)

Mr. WILLARD: We offer to show that a communication was thus sent and that this is a copy of it (referring to paper marked B).

(Offer objected to; objection sustained; exception by defendant.)

Q. Through whom did Mr. Farmer, as general passenger agent, communicate his orders and instructions for the conductors?

A. To the ticket-receivers.

Q. Where were they stationed at that time?

A. One was stationed at West Philadelphia, another at Trenton and a third at Jersey City.

Cross-examination waived.

Counsel for defendant then read in evidence the deposition of ERASTUS BROOKS, as follows:

Reside at Staten island, New York; am an editor; have been senator, assemblyman, member of constitutional conventions of 1867–'68 and 1871–'72, and of various trust companies, etc.

On or about December 16, 1880, I was on a train of the Pennsylvania railroad, going from Philadelphia to New York.
289 Trouble was caused, as I understood, by the passenger having a ticket upon another line, which the conductor refused to accept.

The conductor and the passenger in question engaged in a warm discussion, whose words I did not hear, but understood to be growing out of the demand for money for his passage. The passenger remained in the car until it stopped, when, as I understood, he was required to leave the car, and when the car stopped did leave it, the conductor so insisting. I did not witness the use of any force, but there may have been some, as the passenger asked me, a stranger to him, to note that he had been ejected from the car. I do not recall the use of any violence, or did I hear anything. I was sitting two or three seats in front of the passenger. Between the demand for passage money and the removal of the passenger from the car several minutes elapsed, but I cannot say how many.

Q. Was there time enough for him to have paid his fare before being removed?

A. I think there was. I did not see any shoving of the passenger against the door or seats.

Mr. WILLARD: The purport of that part of the deposition of Mr. Crane which we offer relates to the telegram sent by the Baltimore and Ohio to the Wabash, requesting them to continue the sale of those tickets, notwithstanding the nature of the previous orders by the defendant not to do so.

Judge SMITH: It may be competent hereafter in mitigation of damages.

290 BENJAMIN F. WILSON recalled.

Examination by Mr. WILLARD:

Q. Please look at this order, Mr. Wilson, and refresh your recollection, and state, if you can, what date it was that you received the order from the ticket-receiver about which you have stated. (Letter book handed to witness.)

Mr. HYNES: We object to his refreshing his recollection by an independent paper shown to him that he has never seen before.

The COURT: The objection is not well taken. He may refresh his recollection from any document if, after he has done so, he can speak from recollection.

Mr. HYNES: Whether he has ever seen it before or not?
The COURT: Certainly.

(Ruling excepted to by plaintiff.)

Mr. WILLARD: Can you state now, Mr. Wilson, as to the date when you first received those instructions?
A. I could not say what was the exact date. It was prior to December 10th.
Q. After refreshing your recollection by this?
A. I can't say that I seen it on the day it was issued or sent there. Sometimes we don't see them until the next day.
Q. I am asking you your opinion as to the time when you first received it?
A. We generally get orders and put them——

(Objected to by counsel for plaintiff.)

The COURT: Give your best recollection and judgment as
291 to the date. How long before the 10th; if it was prior to the 10th, about how long?
A. To the best of my judgment I suppose I must have seen it the 5th.
Mr. WILLARD: On or before the 5th?
A. On the 5th; on or before, I could not say which.
Mr. HYNES: Or after?
Mr. WILLARD: What do you say?
A. I will say on or before the 5th.

Cross-examination waived.

RUFUS N. PILE recalled.

Direct examination by Mr. WILLARD:

Q. I am not sure that I asked you what date this order was communicated to the ticket-receivers?
A. The order was sent on the 1st of December, 1880.
Q. It was sent to them at that time?
A. Yes, sir.
Q. Would they, in the usual course of business, receive it on that day?
A. Yes, sir.
Q. And act upon it from and after that time?
A. Yes, sir.
Q. Do you know what the duties of conductors are with reference to consulting the ticket-receivers' books with reference to orders communicated from your office?

(Objected to by counsel for plaintiff.)

The COURT: I understand the conductor has already testified he did see that order in the book. I don't see any point to it, but he may answer.

A. I know that they are required to consult the ticket-receivers' order book frequently—daily, I might say.

Mr. WILLARD: Daily?

A. Yes, sir.

292 The COURT: What is a ticket-receiver? Do you mean the ticket-seller at each station, or what?

A. Well, sir, he is an official that is appointed to receive the tickets that the conductors collect while they are on their trains.

Q. Receive tickets that are taken up?

A. Yes, sir; turning them in to the general offices.

Q. They give the orders to the conductors?

A. Yes, sir.

Cross-examination waived.

PLAINTIFF'S EVIDENCE.

William J. Connell.

Direct examination by Mr. HYNES:

I am the plaintiff in this case; am forty years of age and reside at Omaha, Nebraska; I have lived there since the spring of 1867.

Q. What is your business?

A. I am an attorney-at-law, and have been in active practice since I was admitted, which I think was in 1869 or 1870, at Omaha. My residence was in Omaha; my practice extended to the adjoining counties and to Lincoln, Nebraska, the capital of the State, where the United States circuit court is held in the month of January, and to the supreme court in the same place, and also in the Supreme Court of the United States to a certain extent. I have been in general and active practice constantly.

Q. In December, 1880, state, if you please, if you had occasion to buy a ticket there?

293 A. Yes; I was called East at about that date to attend the Supreme Court in Washington; I also had business in New York city, and at Hartford, Connecticut. I went to a general ticket office, known as the Grand Union ticket office, in Omaha, which is located on the corner of Farnum and Fifteenth streets, the most public corner, I think, in the city; it is the most prominent ticket office—more so, I think, than any other in the city. I went there in company with Mr. J. L. Webster, of our city, who proposed to accompany me to Washington. We purchased our tickets from Mr. Frank Moore, the general agent there. He bought his ticket to Washington and I purchased my ticket to New York city, saying to Mr. Moore that I expected to stop with Mr. Webster at Washington, and desired, therefore, an unlimited ticket—one that would give me the right to stop at Washington as long as I pleased; I didn't know how long I might be detained.

Q. What did you get—this ticket that has been introduced in evidence?

A. I received from Mr. Moore the ticket that is already introduced in evidence.

Q. That is, this part of it?

A. Yes; at the time I received it it was perhaps ten or fifteen inches long, with coupons over the several lines of the road forming the route from Omaha to New York city.

Q. When did you buy it, on what day?

A. I bought it on the 7th day of December, 1880, the day it bears date; and on the same day, in the afternoon, I left Omaha for Washington, and I reached St. Louis the following morning, about half past 6 or 7, and reached Washington in the afternoon of the 9th, and if I had continued I would have reached New York city on the same evening—on the 9th—had I continued my journey without stopping at Washington.

294 Q. Well, you remained in Washington until the 16th?

A. No, I remained in Washington until the 15th of December. Then I went on to Baltimore, and I remained in Baltimore over that day and night, and the following morning I took the train for New York, leaving Baltimore some time in the morning, and reached Philadelphia, I think, about noon.

Q. Now, did the coupons that were detached from this ticket cover the route you had taken up to that point?

A. Yes; there was in the first place a coupon from Omaha to some point between Omaha and St. Louis, and another to St. Louis, and another to Cincinnati, and from there to Washington, and so on; there were several coupons.

Q. Now, you traveled until you reached the vicinity of Philadelphia?

A. Yes, sir.

Q. Tell us what occurred there?

A. Well, when we reached Philadelphia the conductor of the train notified the passengers in the car in which I was sitting to go forward to the next car, as the one that we were in, which was a parlor car, would be left at Philadelphia.

Mr. TRUDE: The conductor of this train?

A. No.

Mr. TRUDE: Then I object to any statement of any other conductor of any other train.

Mr. HYNES: Well, after you were transferred to this car from the parlor car, what then?

A. We were run onto a side track and remained there until some switching had been done, and while we were there, before we started to cross what is known as the Junction road—that is from this Gray's Ferry to West Philadelphia—another conductor entered the car, which I understood was the conductor of the Junction
295 road, and examined the tickets, and I tendered him my ticket, and he examined it and said it was all right.

(Objected to.)

The COURT: While it is not material what any other conductor or any other person said, yet it might possibly go in to show good faith, that he believed that he was rightfully on the car.

A. Well, that is the same car from which I was finally ejected. This car was transferred across Philadelphia to the West Philadelphia station, and from there we left for New York, leaving at about 1.30, I should think.

Mr. HYNES: Now, then, after you left Philadelphia, after this conductor handed you back your ticket, when did Mr. Wilson come on the car?

A. Mr. Wilson entered this same car from the front after we had left Philadelphia—I could not say what distance; perhaps twelve or fifteen miles.

Q. What occurred then?

A. He called for tickets and passed from the front towards the rear, and he received and examined several tickets, and finally reached my seat, and as he reached my seat I passed him my ticket, the one that has been referred to here, the one that has been offered in evidence, together with a five-dollar bill, and as I handed it to him I said to him, "Mr. Conductor, will you be kind enough to change that bill? I want to get some change to purchase papers." And he took the bill and the ticket, and glanced at my ticket and tossed it back towards me, and it fell in my lap, saying, "Your ticket is not good, sir." I expressed surprise that my ticket was not good, and I asked him why it was not good, and he said, "It is a Baltimore and Ohio ticket." And he said, "You
296 came over the Baltimore and Ohio railroad, didn't you?" and I said "Yes." "Well," he said, "this road don't receive passengers or honor tickets in connection with that road. We are in a fight with that road and don't honor their tickets any longer," and I said that was a funny state of affairs, that I had purchased my ticket of the general agent at Omaha in good faith without knowing anything of this trouble. Well, he said, I will have to take your fare, and as he made that remark, having the money in his left hand he made a motion to transfer it to his other hand, and noticing what he was doing and hearing that remark, I said to him "Mr. Conductor, I wish you would return my money, if we are to have any misunderstanding concerning this ticket let us settle that on its merits, but I desire that you should return my money;" and in place of doing that he said to me, "If you desire to avoid all trouble pay your fare," and he continued the motion as if to put it in his pocket, when I suddenly reached forward and seized the money and so got it from his hand, which I did, I got it from his hand.

Q. Did you pull the money out of his hand?

A. I got it; I just twisted it out of his hand, and as I did so I said, "Mr. Conductor, I don't propose that you should steal my money from me," and he responded, "I was not stealing your money, sir;" and I said, "You are doing what I consider equivalent to it; I handed it to you for the purpose of making change, and you have no right to appropriate it for any other purpose," and he then turned to me and said, "Now, sir, pay your fare, or I will bounce you off this train," and he said this in a very vindictive, decided and excited manner.

Mr. TRUDE: I object to the words "vindictive, decided and excited manner" as improper, and I ask to have this stricken out.

297 The COURT: Strike out the word vindictive.

Mr. HYNES: Go on.

I then said to him, "Now, Mr. Conductor, I am willing to pay my fare if I am in any way in the wrong, but," said I, "let me ask you in the first place if I have made any mistake in getting on the wrong road or train. Is this the Pennsylvania railroad indicated by this ticket?" and he answered, "It is, but as I have told you before we don't receive passengers or honor tickets in connection with the Baltimore and Ohio;" and he said further that if I wished I could present my ticket to the Baltimore and Ohio railroad in New York, and the money would be refunded; that the fare to New York was $3.25, and I could get my money back by going to this ticket office in New York; now, I said, "Mr. Conductor, if I had bought my ticket in any irregular way, I don't know that I would object to that, but I bought it at the regular ticket office, and if what you tell me is correct, you can do it, I will give you the ticket back, and you can do that;" he said that was not his business; and we talked a little more, and he asked me my name and I told him, and he asked me my residence and I told him, and I put the same questions. I asked him his name, and he said, Wilson, or B. F. Wilson, and when he required me to pay my fare I told him that if he could assign no other reason than the one he had given me, that is, that the railroad was in a fight with another railroad, something I knew nothing about, that I would decline to pay my fare, that I believed I had a right to ride to New York. I didn't make a threat that I was going to ride to New York, but I merely expressed a belief that on my ticket I had a right to do so, and if he could give me no other reason than the one he had as-

298 signed I should decline to pay; he then started to the rear of the car and pulled the bell rope, and I went forward to the seat occupied by Mr. Brooks. Mr. Brooks was at that time an entire stranger to me; I didn't know even his name; I had never seen him before, and I had never spoken to him; in fact, I had never spoken to but one other person on the train previous to that time, and I endeavored to explain the matter to Mr. Brooks as to what the trouble was, and where I had obtained my ticket, and stating to him in that connection the fact that the conductor was about to put me off, which I didn't think he ought to do, and Mr. Brooks turned partially towards me, and the conductor was coming up at the time, and he said, "Now I don't wish to have anything to do with this trouble," and turned partially to the right, that would be away from the door, and the conductor at the time had reached me, and took me by the right shoulder and jerked me around towards him, that would be facing him, and said, "Are you going to get off this, train, sir?" He didn't ask me again for my fare, but wanted to know if I was going to get off the train, and I said to him: "I have tendered to you my ticket once and I will tender it to you again." I didn't say I

would not get off, and I held it out to him, but without giving me an opportunity to get out, or get my things, he seized my hand with one of his and with his other hand caught me by the shoulder and jerked me toward the rear of the car, and I got perhaps to the second seat before I attempted to do anything, and then I merely pulled back with my right hand, and resisted his efforts to pull me down in that rapid way; but he jerked me so violently and roughly that the ticket was in some way thrown out of my hand, which
299 was the hand that he had hold of, and the left, which was on the side on which I had been sitting—I think the identical one which I had previously occupied, and I said to him: "Now, Mr. Conductor, if you are determined to put me off the train let me take my ticket that you refuse to accept," and he didn't pay any attention to that, and I continued jerking back and endeavored to get my ticket, and I got the ticket. I got back to the seat and secured the ticket in my left hand again, and after I got my ticket he seized me again and I had the ticket in my hand, and I protected my ticket by my thumb; he caught me by my fingers with his hand, and the only way that I could hold onto the ticket was by my thumb, and he caught me by the shoulder as he had before, and dragged me a little way, and the other conductor or the assistant, or brakeman Mr. Uberoth, then took me by the right side, I think he took me by the right wrist and also by the shoulder, and we reached the door in that way, Mr. Uberoth reaching the door first and preceding us in going out; then he got out and turned to the right; that would be the opposite direction from the station, and I would come next in order, and Mr. Wilson having me by the left hand, as I have stated, and as we reached the door Mr. Uberoth, either for the purpose of getting through the door himself or getting me through it, turned my right hand upward, and the result was that it left my elbow—just at that time the conductor gave me a violent push forward, which struck my elbow against the jamb of the door—it was not my shoulder which struck the door, but it was my elbow, and the blow was quite violent, so much so that it somewhat shocked me, it struck on what is known as the crazy bone; and this assistant conductor then passed on leading, and I followed him, and the conductor, Mr. Wilson, coming out last; then we proceeded down the steps
300 in an inverse order, Mr. Wilson, the conductor, going first, and I going second and Mr. Uberoth directly behind me; the steps at that time were slippery, and I knew that from the fact that I had been out on the platform after we had reached West Philadelphia station, and the train remained there for a little while, and I got out and walked about on the platform of the station for a little time, but was careful to get on again in advance of the train going on, for the reason that I had observed that the steps were slippery.

Q. What do you mean by the steps being slippery?

A. With the frozen sleet or frozen rain. This same car had come on from Maryland, and while we were coming from Maryland it rained, and when we reached Philadelphia it was somewhat colder and the rain had ceased, and this rain had frozen and formed a smooth,

slippery surface on the platform of steps. And for the purpose of protecting myself I seized the rail to ease myself down, because the conductor was pulling me violently with the left hand, and the other was crowding me down, and as I reached the rail Mr. Uberoth put his hand over mine and broke my hold and let me go over and I was on the top of the steps, and the result was I went down, and when I went down, I struck my back either on the cross-beam that is at the end of the middle platform or the corner of the steps and Mr. Wilson pulling me by the left hand, and when I got on the platform he held me up in such a way that I didn't go clear down to the platform of the station, as otherwise I would have done, and as he pulled me up with his left hand he then seized me by the other hand, and I was hurt, and didn't wish to offer further resistance, and I said to him, "Mr. Conductor, I am off your train now and I don't propose to get on again, and I demand of you that you let me go," but he didn't do it; he kept hold of my hand
301 and crowded me back and held me there until Mr. Uberoth had gone into the car and taken my overcoat and satchel and thrown them down.

Q. Were there people around there?

A. There were several people about, and as he did that then Mr. Wilson let go of my hand, and then waived his hand as if to the engineer, and as the train started on he let go my other hand and then stepped on the car himself and the train passed along and left me standing there.

Q. When you got to the door, I will ask you whether you offered any resistance to going out?

A. I did not; I never offered any resistance after reaching the door and having my elbows struck, I did resist up to that point; that is, not to the extent of fighting back or endeavoring to do the other parties any injury, but merely holding back and objecting to being hustled out in that sort of a way; but I had my left hand free up to the time that the assistant conductor seized it, and I could have used it if I desired to do so, but I didn't wish to get into any fight.

Q. What was the condition of your hand after you got through?

A. Well, of course, the blood was compressed out of my fingers by reason of being held so firmly for so long a time, and after he let go my hand I commenced to feel something wrong, and I noticed my finger was bleeding, the ring on my finger had been crowded into the other one so as to cut it through to the bone, and the blood was oozing out of my finger, and after reaching Philadelphia it had stained my glove somewhat, and after I got it off I put on a piece of court-plaster, but I didn't attach any serious importance to that injury.

302 Q. At the time Uberoth broke your hold of the hand-rail as you were passing from the platform, state what action of Wilson, if any, contributed to your going down in that way?

A. Why, just after Mr. Uberoth broke my hold and let me go, Mr. Wilson, who was down on the platform, jerked me forward, and the result was that I went down as I have described.

Q. What fare did Mr. Wilson demand of you?

A. $3.25.

Q. Were there many people in the car that you were ejected from?

A. It was not a crowded car, but there were several in the car; I don't know how many there were—perhaps twenty, both ladies and gentlemen; there was only one I had ever spoken to; I didn't know any of them.

Q. Did they look out of the windows at you?

A. I don't know as to that.

Q. There were people outside?

A. Yes, sir.

Q. Were there any remarks made at you?

A. There was a remark made by one of the parties on the platform at the time. There were remarks made by two parties.

Q. Now, what did you do after you got out?

A. Well, I stood still for a minute—I was somewhat dazed—and after a little I picked up my overcoat, as it had been thrown out by Mr. Uberoth with my valise. I picked up my hand-bag and put my overcoat over my arm, and I thought I would walk about a little. I was feeling hurt, but I didn't care to go into the station. I walked about for a little while, and I put my overcoat on, and finally went into the station and sat down there a little while.

Q. Describe how you felt after this pulling around.

303 A. Well, I felt that my back was injured, but I didn't know to what extent. I knew that my finger was hurt; I was feeling faint and dazed, and I remained in the station for a little time, and then I went to the window of the ticket agent and inquired of him whether I could get through to New York or not, and he said no.

I ascertained that I could not find any train at that station to New York, no through trains there as I understood to New York, and I think that was also shown by the time-table.

Q. What did you do then?

A. I then purchased a ticket back to Philadelphia, paying the price, whatever it was, twenty-four or twenty-five cents, and from there took a street car up to the hotel, and I remained there until the next train over the Boundbrook route. That is a different line, that was the line that caused this controversy, it was a new line just opened up from Philadelphia to New York; I purchased my ticket from Philadelphia to New York over this new line, and paid $2.50.

Mr. HYNES: What time did you leave Philadelphia for New York on that train?

A. I think at 7.30.

Q. The same evening?

A. Yes, sir, and I reached New York about 10.30 or about 11 o'clock in the night of the same day.

Q. What then occurred?

A. Well, I took a stage up to the Grand Central hotel, and I had got a draft for $500, but I had only this five-dollar bill when I was

on the train, and I had expended by this time the greater portion of that, so the result was that I had less than one dollar when I reached the hotel, for while I was in Washington I unexpectedly had to advance some money to Mr. Webster.

304 Q. State whether you had separated from your baggage?

A. No, sir, I had no baggage except my hand valise and overcoat, I had no baggage, and I was required to pay my lodging bill in advance, which was $3.50 or $4 a day, I think, and I didn't have the necessary fund to do it, and my draft they would not accept, as it was contrary to the rules of the house, so it was finally arranged that I would leave my watch with the clerk, which I did, and in that way I secured a room and I at once retired to my room, feeling bad as I had all the way through from the effect of the blow on my spine, and I was unable to sleep, I rested a little at times, and dozed a little through the night, but I was not able to sleep, and early in the morning, perhaps half past 5 o'clock, I was obliged to get up and go down-stairs to the water-closet, and went there frequently till the morning. I was in great pain and distress, and I had to make frequent visits and had frequent passages of the bowels accompanied by blood, and I was feeling very much used up. Along in the forenoon, about 10 or 11 o'clock, being out of funds, I felt to be better a little, and I took the stage down on the same street, Broadway, to Kountz Brothers' hotel, and got my $500 draft cashed there, and went from that place into the general offices of the Baltimore and Ohio railroad, to which Mr. Wilson had directed me, and I asked them about the facts and asked them about the redemption of the ticket, and they said they didn't have anything to do with it, that it was the Pennsylvania ticket.

Q. What next?

A. I returned to my hotel, but I was unable to transact any business and I finally concluded to go over to my friends' in Brooklyn; I had some relatives there, and I went there and remained there three or four days with them.

305 Q. How were you feeling during that time?

A. Well, somewhat easier than I did that morning, but I was still in pain, and I was feeling very badly.

Q. How long did your bloody discharge continue?

A. Well, that continued more or less for a day, and I think the next day and maybe to a certain extent for a considerable time longer, but to not so serious extent as at first; while I was at the Grand Central I procured two porous plasters, and put one on my back on the place where I had been struck, and another over my bowels, and they seemed to relieve me some, and afterwards I procured two others and placed them between so that my right side was completely covered.

Q. Were you able to attend to your business in New York?

A. No, sir; I was unable to attend to my business; I was feeling so badly that I abandoned my trip to Hartford, and concluded the best thing I could do was to go home, so I left there as soon as I was able to leave, and reached home the night before Christmas, the 24th of December.

Q. How were you affected on the way home?

A. Well, I was feeling bad all the way home, but I had none of the serious symptoms that I had while I was in New York. The day following Christmas, as I had been absent for some time I found considerable business had accumulated, and I felt the necessity of going down to the office, and I undertook to transact some business and I was taken very much worse, so much so that I got faint and weak, and I could not walk home or go in a car, but I secured a hack and was taken at once home, and my wife was considerably alarmed.

Q. Well, what were your symptoms then?

306 A. The pain was very similar to what I had in New York, only I had them more extreme and more violent and my wife was alarmed and sent for a doctor.

Mr. TRUDE: I ask to have the feelings entertained by his wife stricken out.

Judge SMITH: Let it be stricken out.

A. Well, I at once went to bed and the doctor came and administered opiates and left medicine for me to take and directed the application of hot poultices, which were at once applied and kept up during the afternoon and that night and the following day, and I then felt very much easier, and during this time I had a bloody discharge very similar to this I had in New York.

Q. What was the character of your pain?

A. Well, pains in the back and bowels, and I thought in my kidneys, I thought my kidneys were injured, but the doctor didn't consider they were.

Q. How long did that state of things continue?

A. Well, I remained in bed, I think, three or four days, I am not certain as to the exact time. I commenced to be out in January. Along the middle of January I did some little business, but I was not feeling well through that month, and my weight from 143 or 145, which is my usual weight, went down to 135 pounds, and from that time until the spring, nearly up to July following, I was incapacitated for the active duties of my profession. I attended to some business, but I was unable to be at the office a great deal at that time, and I was unable to attend to my business as I had been before, and as I have been since.

Q. Were you able to attend court?

A. Only to a limited extent; I did go down, I know, in January, to Lincoln, and assisted in a trial of one case, but I was very

307 weak and felt very badly, and looked very badly, as I was told by my friends, during the trial.

Q. Well, how long did the pains and disabilities of which you complain, in any degree or form, continue to trouble you after July?

A. Well, I think after July I was feeling comparatively well, I considered that my general health was restored, I felt very well and I didn't attach any importance to my leg, any permanent injury to my leg until the year following in September, after my leg had kind

of become numb and sore, and I could notice it in my step, I finally observed that my leg was smaller.

Q. The right leg?

A. Yes, sir. I could tell that by putting my hand around it; on the same side I was injured, and then I became somewhat alarmed about my symptons and my condition.

Q. How was it before the injury, smaller or larger than the left?

A. I don't know that it was any larger; if there was any difference between them, it was because I am right-handed, it was certainly fully as large.

Q. And right-footed to-?

A. As far as I know, if I was going to kick I would naturally do it with my right foot; it was certainly as well developed as the other, but I know there was a decided difference from September, 1882.

Q. Well, what has been its condition from that up to the present?

A. Well, from that time up to the present time, it has continued to grow worse, it has reduced in size as I measure it, an inch to an inch and a half smaller than the left, and it affects my step, so that it forces all my weight on the right side, and comes more on the ball of my foot than on the heel, and my step is shorter on the right side, and my step is not free and natural.

308 Q. In stepping, state whether or not the ball strikes the ground.

A. Yes, I think both the ball and heel, but I strike with more force, and the result of that is that on my right foot on the ball, there are callouses, and the remainder of my right foot is as smooth as my hand, and my left foot is the same, and that has come on my right foot since this injury, there was no difference before, and there was nothing of that there.

Q. How extensive was your law business before this time?

A. I was doing a very extensive business, I think my law practice would average well, among the best of the lawyers in Omaha, or in the State.

Q. About how much a month?

A. Well, I was doing a law practice on an average of over $1,000 a month or $12,000 a year, my practice extended to the other counties of the State, and at Lincoln the capital of the State.

Q. What were the sensations in the limb; what are they now, and what have they been since they began to develop this disease?

A. Well, the pain is not sharp or acute pain, but is more of a dull heavy pain, and more in the nature of numbness at night; if I rest on my right side my leg will get very numb, so much so as to wake me up, and the only relief I can get is to rub it, and I am disposed to favor it, not only in lying in bed but in standing; I am constantly disposed to favor this right leg by reason of the injury.

Q. Have you had it examined by surgeons?

A. I have; and I have been treated, and I have taken the best care of my foot; I have taken electric treatment and manipulation,

and I have worn electric belts and batteries and had treatment, electric baths and manipulation.

309 Q. To what extent have you taken medical treatment or advice?

A. Well, I have been acting under medical advice continuously until it assumed serious proportions.

Q. Has it been examined by surgeons here in Chicago?

A. Yes; it has been examined by surgeons here; I first had Dr. Stubbs examine my limb, and then, at the request of the gentlemen on the other side, I submitted to an examination in this building at one time; I think Dr. Isham was the attending physician at that time for the railroad company, representing the railroad, and they examined me; then at their request on the last trial, I went to Dr. Isham's office, and met on that occasion Dr. Isham and Dr. Lee and Dr. Lyman, who were there at the request of the railroad, and they made quite an extensive examination, and I submitted to every test that they required of me; I went there at the hour they appointed and there was no one there, and I waited for some time until they arrived, and submitted to just such an examination as they required of me.

Q. Now, did you communicate the facts to the officers of the company and receive a reply from them?

A. Yes, I have here the original letter received from the general manager of the defendant, dated March 18, 1881.

Q. And the letter that it was in reply to?

A. The gentlemen on the other side will have my original, I have a letter-press copy.

Mr. HYNES: We will offer that letter, the object of it is to show a knowledge of the facts, and we claim it is an element to be considered by the jury.

(Objected to by defendant.)

Judge SMITH: What we propose to prove is to show that

310 this company, in the most formal manner received notice of the manner in which this man was handled, and that having received that notice of what was done to Connell on that occasion, they still continued the conductor in their employ, and that evidence is upon the question of exemplary damages. We propose to offer the letter written by Mr. Connell to the company, and then we propose to offer the reply of the company to that, on the question of animus and the degree or measure of damages.

The COURT: It being admitted that he was entitled to passage to New York, and it also being admitted that he declined to pay his fare, and refusing to pay it the conductor ejected him from the train, the simple question is, did the conductor use more force than was reasonably necessary to eject him. Now, you offer a letter here written by the defendant company, to show that they retained in their employ the conductor after having, as you say, full notice of the facts in the case. I presume if a conductor had made any assault on a passenger, then the company should retain that con-

ductor after facts were brought to its notice, that fact would be an element to go to the jury as affecting the question of the amount of vindictive damages, but the question still remains in this case, did the company believe everything that the plaintiff told it in his letter, and if not, surely they ought not to be mulcted in any more damages because they didn't believe it. I don't see why the company should object to their letter.

Judge SMITH: I am willing that our letter go in.

The COURT: Is there any objection to the letter on the ground that it is a copy?

Mr. TRUDE: I am willing to let our letter in.

The COURT: No, they have not offered the other.

311 Judge SMITH: We offer them both.

Mr. TRUDE: We object to that on the doctrine of a man manufacturing evidence to support his case.

Mr. HYNES: The jury can judge whether it is manufactured.

The COURT: They admit their letter without any objection, so I cannot consider that any further.

Mr. HYNES: I offer them both together as the same correspondence.

The COURT: The letter written by the plaintiff is rather argumentative.

Mr. TRUDE: It comes under the head of a case where a man is manufacturing evidence to support his own case; if it does not I cannot conceive of any case; it shows, evidently, the skill and adroitness of the attorney.

Judge SMITH: I object to counsel stating what the letter shows.

The COURT: I doubt very much, gentlemen, whether this letter ought to go in.

Judge SMITH: Let the record show we offer them both or none.

The COURT: I sustained the objection as to the one; you may put in the other if you wish to.

(Ruling excepted to by plaintiff.)

Judge SMITH: We offer them both or none, as parts of one correspondence.

The COURT: Let it appear that the plaintiff offers both letters. The defendant objects to the letter written by plaintiff to defendant; the objection is sustained. They do not object to the letter

312 written by defendant to plaintiff; the court holds that the plaintiff may offer the letter if they choose from defendant to plaintiff.

Mr. HYNES: Mr. Connell, I will ask you to state what you meant when you said there was only one person in the car there that you knew prior to this difficulty with the conductor?

A. There was only one in the car that I had had any acquaintance with previous to that date; there was a lady that I had assisted——

Mr. TRUDE: I object to anything in reference to the lady; what he did to her or said to her I claim is not proper.

The COURT: Let him state if there was a lady in the car that he knew.

Mr. HYNES: My object is for the purpose of showing that it was not an acquaintance that he could call upon as a witness. My purpose is that the acquaintance he referred to was simply a lady he had helped into the car with her baggage; that he didn't know her name, and didn't know who to call upon for evidence.

The COURT: Ask him that.

Mr. HYNES: Is that a fact?

A. That is the fact, yes, sir. I do not care to add anything to that, if that is satisfactory to you, Mr. Trude.

Q. Now, Mr. Connell, I will ask you to state whether there were any gestures used by the conductor when he said he would bounce you?

A. Well, only in the way as I stated, that he said, "Now then, you pay your fare or I will bounce you off this train," he said it, as I stated, with his fist doubled up in the way that I indicated.

Q. How much time have you lost from your business, Mr.
313 Connell, by reason of this injury?

A. I would say I have lost an aggregate in time of from six months to a year; six months would be a moderate estimate, taking into account the disability and how it has affected me.

Q. Mr. Connell, do you know the extent of the Pennsylvania railroad system?

A. I know in a general way. It is a system that covers something over seven thousand miles, extending to New York.

Cross-examination by Mr. TRUDE:

Q. Mr. Connell, when the conductor first asked you for your ticket, he did it in an ordinary tone of voice, did he not?

A. Well, I am not absolutely certain, Mr. Trude, that he asked me for my ticket. I know I passed him the ticket as he came up. I don't think in the first instance that he spoke to me——

Q. When he told you the ticket was not good he then addressed you in an ordinary tone of voice, did he not?

A. Yes, sir; he said, "Your ticket is not good, sir."

Q. And he at this time had the five-dollar bill which belonged to you in his hands?

A. Yes, sir.

Q. Which you had given to him for the purpose of making change to buy a paper, as you stated?

A. Yes, sir.

Q. And then let me ask you if you did not jump up and wrench this bill from his hands at that time?

A. Not until I had requested him to return it to me; then I suddenly seized the bill and secured it.

Q. Didn't you seize him by the wrist and wrench the bill from him?

A. No, I don't think I did; I know I did not seize him by the wrist.

314 Q. At the trial before Judge Anthony about June 20, 1882, didn't you state as follows: "I incidentally—that is in that connection—I incidentally seized his hand and wrenched this five-dollar bill away from him"?

A. Yes, sir, that is correct.

Q. Now, at that trial, before Judge Anthony, did you say a single word, from beginning to end, in that trial, about your leg being injured or being diminished in size?

A. I did not, because at that time it had not developed.

Q. Answer the question; don't let us have an oration.

A. I am not making you an oration; I am merely giving you the facts.

Q. Let your answer be responsive; you know what the rule is. You did not say anything about it, as I understand you?

A. I mentioned the fact of the injury and how I had received it.

Q. To your back, but did you say a single word about your leg being either injured or a diminution in the size of it, or any effects of atrophy of the leg?

A. At that time it was not developed.

Q. I don't ask you that, whether it was developed or not. That will be argued hereafter.

A. I said then that I did not.

Q. You did not say anything about it, did you?

A. I could not state it at that time.

Q. Did you state it?

A. I did not.

Q. Or make any allusion at all to your leg?

A. Not to my leg.

Q. This was in 1882, and the injury took place in 1880?

A. In December, 1880.

315 Q. On that occasion, before his honor, Judge Anthony, did you make any allusion whatever to the conductor's doubling up his fist at any time, either in the car or on the platform?

A. Yes, sir; I stated the facts just as I have stated them here.

Q. Answer my question. You know what contradictory testimony is, and what I want to get at. Did you say anything about the conductor's doubling up his fist?

A. I say, yes; I stated the facts just as I stated them here yesterday.

Q. That leads to an argument as to what you said here. I am asking you what you said then?

A. I said yes.

Q. Mr. Witness, when you got in the car, or, at least, when you were sitting in the car the conductor came up to you and you handed him this bill to change, and then something was said about a ticket, and some little time after that you went up and had a conversation with a gentleman by the name of Brookes?

A. Yes, sir.

Q. What did you say to Mr. Brookes?

A. Well, I stated to him that I had a regular ticket over the

Pennsylvania road, which I had in my hand, and showed him, and that the conductor was proposing to put me off, and I believe I was stating to him where I had purchased it; but before I had concluded the conversation the conductor came up from behind and pulled me around, and, as I stated before, as he was coming Mr. Brookes remarked that he did not wish to have anything to do with the trouble, if there was going to be one, between the conductor and myself, and turned, facing towards the window, rather away from us.

Q. He was a little *might* disgusted with your conduct,
316 wasn't he?

A. Well, I don't think he was; but I guess he didn't care to engage in any trouble with the road.

Q. Let me ask you why you addressed yourself to Mr. Brooks.

A. He was the nearest gentleman to me.

Q. Was it for the purpose, you then and there being a lawyer, of laying the foundation for a lawsuit, or what was the motive?

A. I just wished to ascertain the name of some one, without any particular purpose in view.

Q. The lightning rapidity of the mind of a lawyer was operating, wasn't it? A lawsuit was in the range of his legal vision?

A. I had no definite idea of a lawsuit at that time; in fact, I tried to avoid it.

Q. When the conductor told you what his instructions were, Mr. Connell, was there anything about his language, or the way he acted, to lead you to believe that he was not acting in good faith as far as he was concerned?

A. Well, I did not question his good faith, except in refusing to return my money. I thought he ought to do that when I asked him politely to do it, when he knew I had given it to him for change.

Q. When he told you that you must pay your fare or get off, you having the five dollars with you, why didn't you pay your fare and avoid all this trouble?

A. Because I had a straight ticket that I bought in a regular way, and I believe that I had the right, and I didn't believe that because his railroad was in a fight with the Baltimore and Ohio that I should be prejudiced, and I felt that it was an outrage upon me.

Q. You knew, as a lawyer, that it was your duty to have paid your fare or have got off, didn't you?

A. No; I didn't consider that.

317 Q. You had been practicing, how many years, prior to this time?

A. That was in 1880; something over ten years.

Q. You heard the law enunciated by his honor, Judge Hawes, yesterday, and as it has been declared by our supreme court; now, do you mean to tell this jury here, after the eulogies that Mr. Hynes has given you here, of your sterling traits as a distinguished lawyer, that you didn't know what your duty on that occasion was?

A. Well, I thought I did, and I acted according to my best judgment.

Q. You are ready to confess now it was wrong, aren't you?

A. I confess I am not morally wrong.

Q. We are talking now from a legal aspect; we are now in a tribunal where the law is administered.

A. I hardly know what I would do if the thing was to be repeated. I believe a man has rights that he is justified in asserting and maintaining.

Q. You did not get off?

A. No; I went forward to speak to Mr. Brookes.

Q. And you can't give this jury any reason why you asked Mr. Brookes for his name, can you?

A. Merely to ascertain his name and to know to whom I might refer in the case of making a statement to the company, which I subsequently did.

—. Didn't you want to be put off from that car?

A. I certainly did not. I was very anxious to go through.

Q. I will ask you if you did not state before his honor, Judge Anthony, at the time and place referred to, and in his court referred to, to wit, in the county of Cook, as follows—and again before Judge Gary: that "I merely tendered him the ticket. I had not refused to get off, nor did I propose to resist his attempt to put me
318 off. I did not propose, however, to go off voluntarily, because I believed I was in the right"?

A. Yes, sir; that is the reason I did not propose to go off voluntarily.

Q. You did not propose to go off, as I stated before, voluntarily?

A. No, sir.

Q. You wanted him, then, to put you off?

A. I didn't wish him to put me off in the manner he did put me off.

Q. You did not propose to go voluntarily off there?

A. No, sir; I did not.

Judge SMITH: A man who will go off at the *ipse dixit* of one of the autocrats of a railroad is a sneak.

Mr. TRUDE: I except to that remark.

The COURT: That is not proper. The court instructs counsel it is not proper to make those statements in the presence of the jury.

Judge SMITH: The statement is withdrawn; he would not be a sneak.

Mr. TRUDE: I object to that remark.

The COURT: Let it appear in the record that the court instructs counsel that such remarks are not proper in the presence of the jury.

Mr. TRUDE: You resisted until you got to the door, did you not Mr. Witness?

A. Well, I resisted to the extent I have stated. I held back and did not go voluntarily. I did not fight, though.

Q. Did you grab hold of some of the seats as you were going out?

A. I did.

Q. You have told the jury that while you were in New York city you had some bloody discharges?

A. Yes, sir.

319 Q. Bloody dysentery, and that you suffered great pain? You repeated that again and again, as I understand it—suffered great pain while you were in New York city and that these pains continued while you were in New York city and while you were in Brooklyn, where your relatives were, and that you were in pain when you went from the hotel to where you got this $500 draft cashed; is that correct?

A. No, sir; I didn't state it exactly in that way. I stated that during the night I suffered considerable. I was unable to sleep, and early in the morning I was obliged to get up, and I went to the water-closet.

Q. You had these bloody stools you refer to?

A. I went there frequently, and while I was there I was in great pain, but, after a while, I was relieved somewhat.

Q. You were in pain when you went to the closet; when you defecated it was bloody?

A. Yes, sir.

Q. Now, tell these gentlemen whether or not it occurred to you to get a doctor—did you get a doctor?

A. I did not.

Q. Did you call for a doctor while you were in Brooklyn, or while you were in New York city?

A. I did not.

Q. Did you do anything besides get a porous plaster?

A. That was all I did, and kept quiet and was careful of myself.

Q. You did not call in any physician to treat you, or give you any advice as to your condition, or in reference to these stools?

A. Not until my return to Omaha. I hadn't had a physician for many years.

Q. When you got to Omaha you saw this man there, Dr. Chadwick?

A. Yes, sir.

320 Q. Is he much of a doctor?

A. I think he stands very high in Omaha.

Q. Isn't it true he is a man noted for his excessive use of liquor? Isn't that his unfortunate failing?

A. Not at this time; it was at one time. He was connected with the Bellevue hospital in New York at one time.

Q. When did he become addicted to the excessive use of liquor?

A. Several years ago; not to an excessive extent except periodically. He was not a constant drinker.

Q. When he did drink he did it?

A. I have known him to go to extremes, that is a fact; but he is an able, brilliant fellow.

Q. By the way, this man Chadwick is your brother-in-law?

A. Yes, sir.

Q. Did you ever use a porous plaster before?

A. I don't know that I had, but very frequently since.

Q. You did not take anything internally?

A. No, I don't know that I did, but I may have taken some brandy.

Q. In speaking of the business which you did—a thousand dollars a month, I understand—is that right, Mr. Connell?

A. I have been doing a business equal to that for now several years. I should safely say for three years prior to 1880. Before that it was somewhat less.

Q. You must be a man of considerable means?

A. I don't claim to be the richest man in Omaha.

Q. Getting that way, then?

A. I think my note in the bank in Omaha would be honored for $20,000 or $25,000 without a signature, or even $50,000.

Q. You have also dabbled in politics, haven't you?

A. Yes, I have mixed up in politics some.

321 Q. By the way, that leads me to inquire. The gentleman that appointed you, Mr. Chase, wasn't he indicted himself for some little vagaries, like perjury and corruption?

Mr. HYNES: I object to the question as far as he has gone.

Q. I will ask you if it is not true, Mr. Connell, that you never carried a cane until your case had left the appellate court of this district. Answer it by yes or no.

A. No, sir; until the questions of fact in this case had been settled I never did. I considered my case forever ended at the time I first carried it.

Q. When did this case go from the appellate court?

A. I cannot be absolutely certain about that. I think in 1883.

Q. Then about two and a half years had elapsed before you carried a cane at all?

A. Yes, sir.

Q. I will ask you if you did not state before his honor Judge Anthony at the time and place referred to, and you then and there being under oath, as follows: "I am now in good health. Q. How long did this affect you—referring to the accident? A. I was very seriously affected until the latter part of January; I did not feel entirely free from the trouble until the following summer."

A. Yes, sir; that is as I stated then and as I state now. I am there referring to the blow in my back.

Q. You have got all over that?

A. Yes; I considered general health restored, as I do to-day.

Q. Did you particularize in your testimony?

A. The testimony will show; I am referring to the difficulties that I had in New York, and that again happened when I returned home on the 26th of December.

322 Q. Were you not referring to a complete recovery from all ills at that time?

A. I was referring to just what I have stated.

Q. Answer my question; did you state at that time that anything else was the matter with you?

A. The record will show that my attention was directed to the

troubles that I had in New York, and the troubles that followed when I got home.

Q. Now, let me ask you, did you state that there was anything particularly the difficulty with any member of your body or arms or legs or any part of your body?

A. I will say, as I said before, that at that time the injury to my leg had not developed to the extent that I considered it alarming.

Q. When you said you had recovered you supposed the recovery had reference to everything appertaining to your physical condition?

A. I referred to my general health, which was very seriously impaired, so much so that my weight was reduced, as I said before, one hundred and forty-three or five to one hundred and thirty-five pounds.

Q. When you were asked by your own counsel in chief and by counsel in cross-examination with reference to your condition, didn't you pronounce yourself well at that time?

A. I said I considered my general health restored, and I do now.

Q. Did you use the words "general health" at all in answering the question?

A. I think so.

Mr. HYNES: He said "I stated and do now state my general health is very good."

Mr. TRUDE: That is the last trial. Did you use, before his honor Judge Anthony, once, the words, "general health"?

323 A. Well, I am not certain; I know I have used those words before; I used them on the last trial before his honor Judge Hawes, and I am certain before Judge Gary as well.

Q. I am speaking of the trial before Judge Anthony; did you ever say a word there about your general health?

A. Well, I did not, unless my attention was directed to it, and whether it was or not I am unable to say.

Q. Didn't you state just this language and nothing else, because it is the language you employed before Judge Anthony that I want to get at; didn't you use just this language: "I was very seriously affected until the latter part of January; I didn't feel entirely free from the trouble until the following summer." Did you use just that language or not?

A. Yes, sir; and that is correct.

Q. Did you make any allusions on that trial before Judge Anthony about your sciatic nerve?

A. I have answered that before.

Q. Not the sciatic nerve of the foot; did you refer to it before Judge Anthony?

A. I did not.

Q. You stated that you have lost quite a number of months in consequence of being sick with this leg and your bowels and the sciatic nerve; can you name me a client you lost in consequence of being sick?

A. I don't know as I can name a client.

Q. Something was said during the last trial about your books;

did you bring them this time showing the magnitude of your business?

A. No, sir; I have only stated my business in a general way. I have books containing a record of my cases; a bank book and so forth.

Q. Business books showing the magnitude of your business and the cases you were in?

324 A. Only as you would gather it from my record of cases and my bank account.

Q. Did you try some cases in January, 1881?

A. I stated that I tried one case at least; it may be that I tried others; I don't remember.

Q. Did you refuse any retainers in January, 1881, that is, right after this accident?

A. I know I was away from my office a great deal.

Q. Did you refuse any retainers?

A. I have no distinct recollection of refusing any money that was tendered to me, if that is what you mean.

Q. You worked pretty vigorously right along after this too, didn't you; a little while after this you got into a vigorous defense of sundry aldermen and other persons?

A. No, sir; that was many years after, as late as 1884 that I had anything to do with any defenses that I remember of.

Redirect examination by Mr. HYNES:

Q. Mr. Connell, will you tell the jury why you did not speak of the atrophy of the right leg in the trial before Judge Anthony?

A. Because at that time it had not developed to the extent of attracting my attention; it was afterwards that I noticed my limb was getting smaller and that this numbness continued.

Q. Before you commenced the trial before Judge Gary had the atrophy developed?

A. It had, and was stated as fully then as it is now; that was before the case went to the supreme court.

Q. Why do you use the cane?

A. Well, I use it as a matter of convenience, not as a matter of necessity; I usually carry it when I am walking.

325 Judge SMITH: You don't count on the cane?

A. No, sir; I haven't paraded it or made use of it or called attention to it.

Q. You were asked whether Brooks was disgusted; I will ask you whether you had any expression from Mr. Brooks as to how he felt on the matter, by letter or otherwise?

A. Yes, I had; since then.

Q. Mr. Connell, the question was asked you if you didn't know it to be the law at that time when you insisted upon your right to ride to New York, that the conductor had no right to eject you from the train, that you were bound to get out of it; did you ever, in all your reading of law or in any decision you have ever met of any court, discover that law to be held?

A. I never had heard of any such decision or read of any, but I will say that I did not view it from a legal standpoint, I viewed it as a question of right, and I did not stop to consider the question of law or anything of the kind; I just felt that I was in the right and that I was justified in asserting that right.

Q. Did you know which way the majority of our supreme court would hold on that before that decision was rendered?

A. No; I did not. I know that since, other States have held the other way.

The COURT: The jury and court are bound by the law of this State.

Judge SMITH: Unless we can show the rule is the other way in Pennsylvania; if we can, the Pennsylvania law holds in this State.

Mr. HYNES: When you were standing talking with Mr. Brooks, I will ask you whether the conductor, at that time after he stopped the train, asked you for any fare.

A. No, sir; he did not.

326 Recross-examination by Mr. TRUDE:

Q. Did you not, before Judge Anthony, use this language, "Ever since that time I have enjoyed perfect health." Did you use that language?

A. Yes, that is correct. I enjoy perfect health now.

Q. You enjoy perfect health now?

A. Yes, that is, so far as my general health is concerned.

Mr. HYNES: I will ask you, Mr. Connell—the question was asked you whether you had been in politics.

A. Yes, sir.

Q. What position have you filled in Omaha?

A. I have held the office of district attorney—prosecuting attorney for two terms; for the past four years I have been city attorney of the city of Omaha, and am at this time.

Mr. TRUDE: You were appointed by Chase?

Judge SMITH: We object. In the first place, originally going into that matter was irrelevant, but he went into it, and on redirect——

The COURT: I think they have a right to inquire about that.

Mr. TRUDE: You were appointed by Mayor Chase, were you not?

A. Yes, sir.

Judge SMITH: Appointed to what?

A. Appointed to city attorney. I was elected district attorney.

Mr. TRUDE: Mayor Chase was indicted for bribery and perjury, wasn't he?

(Objected to. Objection sustained.)

Q. And Mayor Boyd sent in the name of your successor, did he not?

(Objected to. Objection sustained.)

327 Q. And the council refused to confirm Mayor Boyd's appointment and kept you in office, did it not?

(Objected to. Objection sustained.)

Q. And you defended these very aldermen that kept you in office, did you not?

(Objected to. Objection sustained.)

Q. And was charged with being one of the boodlers, were you not?

(Objected to. Objection sustained.)

Deposition of Frank E. Moores.

Reside at Omaha, Nebraska, and have for over eight years. Have been railroad and steamship agent for over nine years. Am located in the city office of the Wabash, St. Louis and Pacific railway; keep for sale local tickets and coupon tickets over the Wabash, St. Louis and Pacific, and connecting lines. There are quite a number of connecting lines of the Wabash from Omaha to New York—the Ohio and Mississippi and connecting lines; the Vandalia and connecting lines; the Canada Southern and Lake Shore, and connecting lines; the lines running east of Chicago, Hannibal, Quincy and St. Louis; the Pennsylvania, Erie, Baltimore and Ohio, and the New York Central are connecting lines with these lines out of St. Louis and Hannibal.

My office is located in the northwest corner of Fifteenth and Farnum on the first floor, for the sale of all tickets to eastern and southern points connecting with the Wabash, St. Louis and Pacific; it is sixty by twenty, and one of the most prominent business locations in Omaha, on the direct line to the post office and principal hotels.

328 Am personally acquainted with the plaintiff; have known him ever since I have resided in Omaha. He is an attorney-at-law; his office is in the second building adjoining my office. Remember selling him, December 7, 1880, a first-class unlimited ticket from Omaha to New York city, form O, 145, No. 5. (Counsel shows witness a paper.) That is the identical ticket I sold, less coupons that may have been taken off prior to reaching the Pennsylvania railroad; he paid me $38.05 for it. The stamp on the back of the ticket is my office stamp of date of December 7, 1880, the date upon which the ticket was sold.

The authority I had to sell the ticket in question was the authority vested in me by the Wabash, St. Louis and Pacific railway when commissioned as their agent at Omaha.

Q. What authority had you, and by what right did you sell the ticket, including the coupon attached, which appears to have been sold on account of the Pennsylvania railroad, from Philadelphia to New York?

A. It is an old custom of all roads to give suitable representation

over connecting roads to sell tickets to points over said connecting lines; said custom is recognized by all railroads in the country, and to my knowledge has existed ever since I have been selling tickets, nine years. Have observed the custom by selling tickets with coupons attached over the Pennsylvania ever since I have been in the ticket business. With this one exception I never have known of any such ticket being dishonored. The number of tickets of like character that I have sold would run up into the tens of thousands.

329 Commenced selling tickets of this identical form August 2, 1880. Had sold five of this form previous to this particular ticket; the commencing number of this form is "O." When I sold this ticket I was aware plaintiff desired to stop in Washington. There was no limitation, verbal or otherwise, to plaintiff's right to stop at any intermediate point.

At time of selling this ticket I had no notice or intimation that the sale of such tickets had been discontinued by the Pennsylvania Railroad Company. All railroad business is sent by train mail; letters are frequently delayed in the Council Bluffs baggage-room by being misplaced, and in the Omaha baggage-room, at which place the baggageman leaves all train mail to be picked up by my passenger agent when seen by him.

Received such a notice within a week after selling this ticket. Then turned tickets of this form with face to the rear of the case, virtually placing them off sale. At the time of sale of this ticket they were on sale.

Remitted funds from sale of this ticket to the treasurer of the Wabash, St. Louis and Pacific railway at St. Louis, as is my daily custom.

Having received orders from the central ticket agent of the Wabash, St. Louis and Pacific railway to resume sales of these tickets, I resumed April 1, 1881. Commencing with, I think, No. 6; have sold some thirty since; my closing number is thirty-four; have not known of any tickets so subsequently sold being dishonored or refused by defendant.

330 Know that plaintiff left for Washington on the day of the sale of this particular ticket. About 54½ hours, I think, would be consumed going from Omaha to New York; you leave here at 4 p. m., and are due in New York at 10.30. Leaving here on the 7th a passenger by this route would reach New York at 10.30 p. m. on the 9th.

Deposition of Charles S. Crane.

(Counsel for defendant objected to the answer of the following question, "State whether or not if you know the arrangement or manner of doing business between the Wabash, St. Louis and Pacific railway and the Pennsylvania Company above referred to was ever terminated, and if so when and in what manner," upon the ground that the witness gives his opinion as to the legal effect of the notice referred to, and also objected to it as a question of law.)

The COURT: The circular shows for itself; I think you may read that, reading it in connection with the circular which is attached. You may leave out what he says about terminating.

Mr. WILLARD: It is only the expression of his opinion I object to.

The COURT: You may leave that out, to save any possible error.

Deposition of Charles S. Crane.

Age, thirty-three; am chief clerk in the general ticket department of the Wabash, St. Louis and Pacific railway; reside at St. Louis, Missouri; have been employed in general ticket department about nine years; been chief clerk about three years; my duties as
331 chief clerk are to attend to the detail work of the office, and to represent the general ticket agent in his absence.

It was the custom of the Wabash, St. Louis and Pacific Railway Company to sell tickets from the West to the East, commencing on the Wabash, St. Louis and Pacific railway, over the Pennsylvania railway to points on its line and east of its line; it was also the custom of the Pennsylvania to sell tickets for the West over the Wabash, St. Louis and Pacific railway; such tickets were honored by the respective companies without question; of my own knowledge such custom has prevailed since I have been connected with the general ticket department, as above stated.

The Wabash agent, say at Council Bluffs, would sell a ticket over the Wabash, St. Louis and Pacific railway and Pennsylvania lines to New York, and collect the entire amount due from Council Bluffs to New York, after which the auditor of the Wabash, St. Louis and Pacific railway would send to the Pennsylvania Company a statement showing the proportion accruing on the coupon of said ticket, reading over the Pennsylvania line. This is taken as the basis of the settlement of the accounts between the companies, which are settled monthly, and the same thing is done in the case of tickets sold by the Pennsylvania to the West over the line of the Wabash, St. Louis and Pacific railway.

We received a circular issued by the Pennsylvania railroad, dated December 2, 1880. I have original circular and attach it hereto as Exhibit "A."

332 Cross-examination:

The circular marked Exhibit "A," was received by the Wabash, St. Louis and Pacific Railway Company on or about December 3, 1880. I know of no special arrangement made between the Wabash, St. Louis and Pacific Railway Company and the Pennsylvania Railroad Company with reference to the sale of tickets by the Wabash Company over the route named in the said circular of December 2, 1880. George H. Daniels, at that time general ticket agent, would have been the proper officer to make such special arrangement on behalf of the Wabash, St. Louis and Pacific Railway Company.

The Wabash, St. Louis and Pacific Railway Company did not

take any action with reference to the notice contained in the circular of December 2, 1880.

I think there could not have been any such special arrangement respecting sale of tickets over route designated in circular of December 2, 1880, with which I was not acquainted. Considering my official connection with the company, I would have known of such an arrangement if it had existed.

I do not know when the custom or arrangement referred to in my direct testimony was entered into by the Wabash, St. Louis and Pacific and the Pennsylvania Railroad Companies, or between what officers, or what its conditions were, except as I have already stated.

It being customary when tickets are ordered off sale by one line in which a third line is interested, not to withdraw such tickets from sale until the third line can be notified and arrangements made, if possible, to print another set of tickets, so that the
333 business may be taken care of. We notified the Baltimore and Ohio railroad of the request from the Pennsylvania railroad, contained in the said circular of December 2, 1880. Then the Baltimore and Ohio railroad notified us not to withdraw those tickets, and that they would protect said tickets.

After the receipt of the circular from the Pennsylvania Railroad Company, the Wabash, St. Louis and Pacific Railway Company acted upon the guarantee of the Baltimore and Ohio Railroad Company respecting sale of tickets over route named. The Wabash, St. Louis and Pacific Railway Company never ceased selling tickets over that route to my knowledge. I am in a position to know whether tickets are being sold by the Wabash Company over the route named in that circular. They sell tickets over that route now—by the authority established by general custom, as before stated.

Redirect examination:

Q. How long after the receipt of the circular of December 2, 1880, from the Pennsylvania Company, did you receive notice from the Baltimore and Ohio Railroad Company that they would protect the tickets named?

A. Exact date I do not know, but am satisfied that it was prior to December 10, 1880.

Q. Did you, or did you not, sell the tickets in question under the previous arrangement with the Pennsylvania Company up to the time the arrangement would expire by the terms of the circular of December 2, 1880?

A. Any tickets sold by that route which would enable a man to get through from Council Bluffs to New York before December 10, 1880, would be sold under the old arrangement with the Pennsylvania Company.

334 Recross-examination:

The notice received by the Wabash, St. Louis and Pacific Railway Company from the Baltimore and Ohio Railroad Company not

to withdraw the tickets named in the circular of December 2, 1880, was a telegram from L. M. Cole, general passenger agent, and also one from C. K. Lord, general ticket agent of the Baltimore and Ohio railroad. Telegram hereto attached and marked Exhibit "B."

EXHIBIT "A."

Pennsylvania Railroad Company, passenger department.

PHILADELPHIA, *Dec.* 2, 1880.

General Notice.

Connecting railway and transportation lines are hereby notified to discontinue the sale of tickets and the checking of baggage over this line between Philadelphia and New York, or other points via the Baltimore and Ohio railroad from date, and are respectfully informed that such tickets will not be honored, or baggage received or forwarded after December 10, 1880.

By order of the 1st vice-president.

L. P. FARMER,
General Passenger Agent.

335 EXHIBIT "B."

The American Union Telegraph Co.

This telegram rec'd at N. W. corner 3rd and Pine Sts. Dated

BALTIMORE, MD., *Dec.* 2, 1880.

To Geo. H. Daniels, Wabash R'y, St. L.:

Please get up quickly tickets New York and points east by B. and O. and Boundbrook route, trains run Chicago and Cin'ti N. Y., without change. Coupons should read Balto., Phila., Boundbrook R. R., Phila. and Reading R. R., Phila. and Boundbrook Central R. R., New Jersey, Boundbrook, N. Y., until you get them on continue sales Penn. R. R., tickets by B. and O., reporting entire proportion east Baltimore to B. and O., we are exchanging, and will protect; answer.

L. M. COLE.

Deposition of Morris Trumbull.

Age thirty-three; reside at St. Louis; have been assistant auditor of Wabash, St. Louis and Pacific Railway Company from February, 1880, to present time. Accounts between other railroad companies and the Wabash, St. Louis and Pacific are kept in the office of the auditor of that company at St. Louis.

There was a coupon-ticket account between the Wabash, St. Louis and Pacific Railway Company and the Pennsylvania Railroad Company prior to February 1, 1881, which was settled from month to month.

336 The credit to the Pennsylvania Railroad Company consisted of their proportion of coupon tickets sold by the Wabash, St. Louis and Pacific Company; the debit consisted of the Wabash, St. Louis and Pacific Company's proportion of coupon tickets sold by the Pennsylvania railroad. A report of tickets sold by the Wabash Company over the Pennsylvania railroad during the month of December, 1880, was made by the auditor of the Wabash, St. Louis and Pacific Railway Company on or before January 31, 1881. A ticket described as No. 5, form O 145, Council Bluffs to New York, reaching New York over the Pennsylvania railroad, stamped by the agent at Council Bluffs, December 7, 1880, was included in that report.

The proportion of money due the Pennsylvania Railroad Company on ticket referred to was paid to it by the Wabash, St. Louis and Pacific Railway Company.

Two dollars and fifty-two cents was allowed the Pennsylvania railroad on ticket referred to, and was paid to it. That company has never refunded said money, to my knowledge, or presented a claim, so far as I know.

The report of tickets sold by the Wabash, St. Louis and Pacific Railway Company was in writing, and sent to the Pennsylvania Railroad Company. I have a letter-press copy of said report, and hereto attach a written copy thereof marked Exhibit "C."

337 EXHIBIT "C."

Wabash, St. Louis & Pacific Railway Company.

Report of Coupon Ticket Sales,

on account of Pennsylvania Railroad Company, during December, 1880, including tickets issued by Wabash railway; Toledo, Wabash and Western railway; St. Louis, Kansas City and Northern railway; Wabash, St. Louis and Pacific railway; Chicago and Paducah railway; Toledo, Peoria and Warsaw railway; Indianapolis, Peru and Chicago railway.

D. B. HOWARD,
Auditor, St. Louis, Mo.

From.	Office No.	Destination.	Form.	Consecutive Nos.		No. sold.	Through rate.	Proportion.	Amount.
				Opening.	Closing.				
Kansas City...	18	Harrisburgh	D 25	5 8	.....	2	15 75	3 12	6 24
*	*	*	*	*		*	*	*	*
*	*	*	*	*		*	*	*	*
Omaha.....	39	N. York	O 145	5	.....	1	37 80	.....	2 52
*	*	*	*	*		*	*	*	*
*	*	*	*	*		*	*	*	*
									1,573 32

338 *Deposition of John D. Taylor.*

I am the treasurer of the Pennsylvania Railroad Company, and was such in December, 1880, and have been since. I drew a draft on the Wabash, St. Louis and Pacific Railroad Company, dated February 10, 1881, at sight, for the sum of $636.77, being the amount due from said road to the Pennsylvania Railroad Company, for ticket account, for the month of December, 1880, which draft was duly honored. I have the order of the auditor of passenger receipts of the Pennsylvania Railroad Company, dated February 10, 1881, for $636.77.

EXHIBIT "A."

Wabash, St. Louis and Pacific railway, general ticket office.

ST. LOUIS, Mo., *Dec. 2d*, 1880.

Circular No. 134.

Regarding discontinuing sale of tickets via Baltimore & Ohio and Pennsylvania railroads.

To all coupon ticket agents:

On receipt of this circular please discontinue the sale of tickets to New York, Boston and all other points east and north of Philadelphia, reading via Baltimore and Ohio railroad, Baltimore to Philadelphia, thence via Pennsylvania railroad.

GEO. H. DANIELS,
General Ticket Agent.

339 *Deposition of James W. Savage.*

Age, fifty-six; residence, Omaha; lived in Nebraska upwards of fifteen years; am a lawyer by profession; have been for nearly seven years judge of district court of third judicial district, Nebraska; know plaintiff, and have for nearly the whole period of my residence here; he is an attorney and counsellor-at-law, and has practiced as such for twelve or fourteen years; his reputation as a lawyer in general practice is good. Speaking from actual knowledge in my own court, and from general reputation as to others, I can say his business is quite an extensive one. He has in my own court a great deal of litigation for others, and is quite constantly employed in term time in the trial of causes.

Deposition of George B. Lake.

In my fifty-fourth year; residence, Omaha, Nebraska; lived there since 1857; am a lawyer by profession; have held various official positions, the principal one being judge of the supreme court of this State—since the organization of the State government in 1867; am now chief justice of the State.

Am acquainted with plaintiff, and have been since his advent to the State; he is a practicing lawyer; my acquaintance with him professionally has extended from the time of his admission to the bar here, during which time he was district attorney for the district over which I presided as district judge. From a small beginning as a young lawyer his practice has steadily increased, until now its ranks, as I think, among the first in the State. His
340 reputation as a business and professional gentleman in this community is good. I cannot speak, certainly, as to the extent of his business for the last two or three years. I know it has been extensive; just how extensive I cannot say.

Deposition of William O. Bartholomew.

Age thirty-eight; live in Omaha, and have since 1867; am attorney and counselor-at-law; was judge of county court of this county during part of three terms. Have been acquainted with plaintiff since 1868 or 1869; his main business is attorney and counselor-at-law; his practice is quite extensive in our State courts; he has a very respectable practice in the United States circuit and district courts; he has quite a large general practice. That has been the fact for two or three years, and for more than that.

Deposition of P. M. Chadwick.

Age twenty-nine; residence Omaha; am physician and surgeon; been practicing six years; graduated at the medical department of Burlington, Vermont, in 1875, and at the medical department of the University of the City of New York in 1876; was a year and a half on the house staff of Bellevue hospital, New York city; since that time have been in active practice in Omaha.

Know the plaintiff; knew him in fall of 1880 and winter of 1881. A little after Christmas he was suffering from pain in the back, abdominal muscles and bowels; a great deal of dysenteric discharges and a great deal of pain attending the discharges.
341 The exact length of time I treated him I could not tell. It was all along during holiday week, and I think into January; how long into January I have forgotten. He was confined to his bed three or four days, if I remember right; perhaps a day or two longer.

From the effect I traced this back to the injury he received while he was East.

Q. Let me inquire of you if an injury and jerking around and being thrown off from a car would produce such effects, such as you found the plaintiff in?

A. A man being in perfect health before such accident occurred, and it occurring at the season of the year when such diseases are not prevalent, and the disease following right after the injury, it would be likely to have produced it.

Up to that time, so far as I know, he had very regular health; have never known him to be sick, except a little vomiting or biliousness or something of that kind.

He was suffering from severe pain in the muscles of the back, pain upon pressure, upon movement or twisting in bed, more than usually accompanies such discharges in the abdominal muscles. These discharges were bloody and contained large quantities of mucus, and also contained feculent matter with serum. He had four or five plasters on his back and body that he had placed there before I was called.

I am a graduate of an allopathic school. I should say his entire condition was due to the excitement he was laboring under at the time of the injury, and to the injury he received at that time.

Cross-examination:

My office is next door. I office with Mr. Connell.

342 *Dr. James E. Stubbs.*

Q. Your profession, Doctor?

A. Physician and surgeon.

Q. How many years have you practiced in Chicago?

A. A little over ten and a half.

Q. And how long before that?

A. I had been in practice twenty-three years, lacking about a month.

Q. You are regularly graduated and licensed to practice?

A. Yes, sir.

Q. Have you examined the plaintiff in this case?

A. Yes, sir.

Q. When did you make that examination first?

A. Well, I think it must be three years, I haven't kept any record of it, two or three years.

Q. Have you ever examined him since?

A. I think I examined him a year ago when I was last here at the trial, I don't know how long ago that is, whether it is a year or less than a year.

Q. What did you discover, and state what sort of an examination you made?

A. I found a difference in the size of his legs.

Q. What was that?

A. One was, to my recollection now, varied from an inch to an inch and a half larger than the opposite.

Q. Which was that?

A. I don't know now whether it was the right or left.

Q. Which was the smaller, the one of which he complained?

A. The one of which he complained.

Q. That was the right. Where did you examine it, Doc-
343 tor, at what points?

A. I examined him at the upper part of the thigh; the middle of the thigh; at the knee, and I think I examined below the knee, too, I would not be so sure of that, but that is my impression now that I did it.

Q. To what do you attribute that, in your opinion? What was the cause of that?

A. An injury.

Q. Describe how it would produce that effect, an injury?

A. By waste of the muscular tissue of the leg; an injury in the large nerve.

Q. In the sciatic nerve?

A. Yes, sir.

Q. Where does it take rise, the sciatic nerve?

A. Around in the back of the hip, and supplies the hip; the smaller sciatic nerve supplies this portion (indicating); the large sciatic nerve runs down in the back part of the leg, down on the calf of the leg and spreads out on the foot.

Q. Would it be injured by a blow striking on the right hip, in the region of the spine?

A. An injury close to the spine will affect the whole leg; if it is on one side it will affect that side; if it is in the middle it probably affects both sides—if the blow was in the center.

Q. Assuming, Doctor, that a man in being violently pulled out of a car and dropping, losing his footing so as to strike the region of the rise of the sciatic nerve here (indicating) where I put my hand, whose leg, prior to that time, was at least the size of the other; the right leg being the size of the other up to that time, and this wasting developing a year or so after and progressing so as to continue on wasting, and a reduction up to the present time; I will ask you to state, Doctor, first, whether that diseased condition of the
344 leg would be attributable to that violence, and secondly, what your opinion is as to its continuation?

A. I should lay that trouble to the injury.

Q. And what, in your judgment, is the probability of its continuation?

A. Probably it would continue.

Q. Permanently?

A. Permanently.

Q. Did you examine his foot to see whether there is any evidence there of a weak condition of the leg?

A. I did.

Q. What evidence did you discover there?

A. I found that in stepping he struck the ball of his foot instead of striking on the heel.

Q. How was that evidenced?

A. By the ball of the foot being thoroughly calloused.

Q. Of the foot alone?

A. Of that foot alone; I examined both feet.

Q. Is that the natural action of the foot in a healthy leg, to have the ball strike first?

A. No, sir.

Q. What does it indicate as the condition of the leg?

A. A weakening of the nerve power.

Q. If that thing had continued now seven years after the accident,

Doctor, after the injury, and was still growing worse, in your judgment, would it be permanent or transitory?

A. I should so look at it.

Q. As permanent?

A. Yes, that is taking into consideration the time elapsed from the injury to the present time.

Cross-examination by Mr. TRUDE:

Q. Doctor, you had to depend in coming to the conclusion that you have stated, a great deal upon what the patient said to you, didn't you?

A. No, sir.

345 Q. You did not. There are what is termed objective symptoms and subjective symptoms, are there not?

A. Yes, sir.

Q. If I walk in that sort of a shape, striking on the ball of my foot, that is what you would term an objective symptom, would you not?

A. Well, I never——

Q. Answer my question.

A. I never use——

Q. Wait a minute.

A. I cannot say; I never used those terms at all, so I can't say I used them.

Q. They are current in the profession to which you belong, are they not?

A. I don't think they are, they may possibly be, but they haven't met my knowledge.

Q. You said in the last trial of the case you were familiar with the gentleman whom you call distinguished, by the name of Gross?

A. Yes, sir.

Q. Supposing he employed them wherever he refers to the question of the utterances of the patient, calls them objective, and the subjective symptoms are those that cannot be seen?

A. I could not say what Dr. Gross does say.

Q. Will you say Maudsley does not also say so?

A. No, I will not say that, for I think——

Q. Doesn't Dr. Hammond?

A. Hammond, I think, does, but I am not so sure about it.

Q. You comprehend what I mean by objective and subjective symptoms, do you not?

A. Well, I don't know whether I comprehend what you mean or not.

Q. What is commonly meant in the profession to which you say you belong?

A. Yes, sir.

Q. Now, do you understand me?

A. Well, I understand what is meant by objective and subjective.

346 Q. We will not cavil about the words; don't you know what I mean, yourself?

A. I think I do.

Q. Please answer me, and let the answer be responsive. When this man said he had pain in his leg you took his word for it, didn't you?

A. I did.

Q. You have run across cases where persons simulated diseases and injuries, have you not?

A. Well, I can't say that I have.

Q. I can, by a mere movement of my hand, can I not, make my arm larger or smaller here (illustrating)?

A. Just for the moment.

Q. You did not have your tape-measure on this man's leg by the hour, did you?

A. No, sir.

Q. The mere closing of my fist tightly compresses all the muscles from the arm socket to the extremity of the finger, doesn't it?

A. Yes, sir.

Q. A little twist of the leg from one side to the other will lengthen or shorten a leg, will it not?

A. Not positively.

Q. Doesn't it, for the purpose of an examination, make a difference?

A. There may be a difference apparent, but not real.

Q. That is what I say; that is just the very point; it is an apparent difference?

A. Yes, sir.

Q. But it is not an actual one?

A. No.

Q. We are in harmony there, Doctor?

A. We agree.

Q. It would take, in order to ascertain whether a patient is simulating or not—there ought to be three or four persons examining him, hadn't there?

A. Not necessarily.

347 Q. Let us see what you say about it, yourself. You testified on the last trial of this case as well as on previous occasions, did you not, Doctor?

A. I believe I did; yes, sir.

Q. Didn't you make this answer to a question put to you: "I suppose, if a person was attempting to deceive, it might take two or three persons to watch him while one was measuring him." Did you make that answer?

A. I said——

Q. Yes or no: did you make that answer?

A. I judge I did; yes, sir.

Q. That is true, then, isn't it?

A. What is true, the answer, or——

Q. Your answer, as you made it, is true, isn't it?

A. I think it is; yes, if a person is attempting to deceive.

Q. As to the likelihood of a person attempting to deceive who

has got a big case as he claims, against the railroad, you don't know anything about that, do you, Doctor?

A. Well, I should judge I had——

Q. If he would not attempt to deceive in a case of that kind, can you conjecture where he would be likely to deceive?

A. I claim to have some ability to tell where a man is trying to deceive me.

Q. You are in this case simply for the desire to do justice?

A. I am subpœnaed here this afternoon, or I would not be here.

Q. You haven't got a cent for coming here at all, I understand you to say on the previous trial?

A. I told the truth, yes, sir.

Q. Nothing in prospect?

A. I hadn't any promise of any.

Q. Nothing of that kind and no previous acquaintance
348 with Mr. Connell?

A. I never saw him until I was subpœnaed.

Q. You don't know why he selected you out of the vast number of physicians there are in this county?

A. No, unless he thought I was the best one.

Q. Thought you was the best what?

A. The best physician.

Q. I didn't say the best witness. And in cases where a person simulates he has got to be watched pretty close, hasn't he, Doctor, in order to prevent an attempted fraud being successful?

A. Well, you will have to take that of the individual persons; some persons are more easily detected in crime to simulate than others.

Q. By the way, you did not treat him as a surgeon or physician as a doctor, did you?

A. No, I think not.

Q. You didn't prescribe anything for him, did you?

A. No, sir, I told him he was beyond my prescribing.

Q. I didn't ask you that. Did you prescribe anything from porous plaster to laudanum?

A. No, sir.

Q. Did you give him anything?

A. Nothing, except good advice.

Q. So he saw you merely for the purpose of having you come into court and swearing in the case, isn't that right?

A. I could not say.

Q. Can you define any other purpose?

A. I don't know as it is my place to define what he came to see me for.

Q. That is all you have done, isn't it?

A. I examined his leg as he requested me to.

Q. As a doctor, have you made any contract with a lawyer as to what should be done with any money, if there should be any obtained?

A. No, sir.

349 Q. You haven't had a cent up to this time and no promise of any?

A. No promise of any.

Q. And you are here all the time in these various trials and you say there is no agreement between you as to what shall be done?

A. No agreement, not at all, sir.

Judge SMITH: It stands on the *quantum meruit* truth, do you know what a *quantum meruit* is; are you to have any of it?

A. I have no agreement and no promise of anything at all; I was subpœnaed here this afternoon, and I can assure you I should not have come into this court-room if I had not been summoned positively to be here.

Q. I understand you never had any money?

A. No, sir.

Q. And you never treated this man?

A. No, sir.

Q. Have you made out any bill against him up to this time for any services?

A. No, sir.

Q. Do you belong to any educational institution, medical institution of the city, or any of the hospitals at the present time?

A. No, sir.

Q. Where is your office?

A. 126 State street, over Wilde's clothing store.

Q. How long have you been on State street?

A. I have been fronting State street six years, four years I was on the corner of State and Monroe, and my office faced on Monroe street, so I don't know whether you call that State street or not.

Q. Doctor, this plaintiff claims to have been injured by receiving a blow somewhere in the region of the back, in the vicinity of the spinal column. Let me ask you if you ever knew of a case that you can name now where it produced dysentery?

350 A. My neighbor—I cannot give you his name—a few years ago in a railroad accident, had a bloody discharge in his bowels.

Q. What is his name; somebody I can send out and bring in here and confirm you or confirm me?

A. He is in heaven now, I don't know whether you or I will ever get to see him or not.

Q. Before he went to heaven he had a name, didn't he, Doctor?

A. Yes, but I could not give you his name.

Q. Yet you know where he went to?

A. Yes, sir; my patients all go there.

Q. And they go there in a hurry when you get at them, Doctor?

A. Sometimes.

Q. Doctor, resuming where I left off, upon that which is more important; can you tell me of a case either in the books or out of them that you can absolutely identify where an injury to the physical frame produced dysentery of the bowels?

A. Well, to say that it produced dysentery, I would not; I would not put it under that head; they may have bloody discharges from

the bowels which is not always dysentery, which they do after accidents.

Q. You remember the last time you said something about books, that you had a book that would reveal that. You remember I asked you to bring the books back here, and we didn't see you after that, have you brought the books now in the court?

A. No; you didn't send for them.

Q. I asked you if you would bring them, and you said you would, as you left the stand; have you the books in court now that will show any case anywhere in the range of your profession where an injury like that described by Mr. Connell produced the results described by Mr. Connell?

351 A. I haven't heard him describe it, and I have forgotten his description, but I can bring the evidence——

Q. Have you anything here now?

A. I told you sir, I had not a book here with me.

Q. Have you the name of a patient on whom these results were ever produced?

A. I haven't his name, but I have one.

Q. What is the name?

A. I just told you I could not give you his name. It is some twelve years since I left that section of the country.

Q. Where there is this bloody discharge there must be a lesion or a rupture, must there not?

A. Not necessarily; no, sir. There may be an oozing, which is not a lesion proper, nor a rupture. Blood may ooze through the pores of the mucuous membrane.

Q. It may ooze through the pores, but what occasions the oozing of the blood through the pores?

A. That will depend on circumstances. It may be from a severe shock; it may be from a diseased condition of the system.

Q. Must not a shock produce a lesion then, Doctor? You testified before in this case?

A. A shock will produce a lesion; yes, sir.

Q. That would manifest itself how?

A. In different ways.

Q. When a rupture or lesion occurs, doesn't it naturally follow in consequence of a shock that is of such severity that it will produce these results, isn't the victim of those shocks prostrated?

A. Not necessarily; no, sir.

Q. Name me a person who ever received injuries of that kind that was not prostrated?

A. I cannot do it; that is not necessary.

352 Q. Did you ever treat a patient, Doctor, who sustained an injury to the spine, that part of the back already indicated by Mr. Connell, or anywhere near that, who had these discharges described by Connell?

A. I don't know what these discharges were. I haven't heard his description, so I could not say.

Q. You are testifying here with reference to this, are you not?

A. I have not heard him make his statement yet, what he had.

Q. You told the jury that what he did have was attributable to an injury.

A. In referring to the leg I claim that atrophy of his leg is the direct result of the injury. I claim, further, that if he had a severe shock, and was thrown any distance, or fell—it may not be over three feet—he might have hemorrhage from the bowels, or bloody discharges. I am not afraid of being backed up in that by the profession generally.

Q. I understand your oration; but can you give me a case? We are going back to what he described with reference to his injuries. By the way, when you examined this man you were alone, were you not?

A. Yes, sir.

Q. You did not have two or three persons, which you say is necessary, to watch a man who is practicing or intending to practice a fraud? You had no helps there to watch him, did you?

A. I am not going to criminate a man by saying he was trying to deceive me, and say it was necessary to call in help. I don't think he was.

Q. You don't think he was?

A. No, sir.

Q. Do you think it is necessary for you to defend him? I
353 ask you a plain question. Did you have any help at the time you made the measurement?

A. No, sir; I did not.

Q. You have to take the word of your patient, do you not, Doctor?

A. Most certainly. If a man comes to me and says he has got the stomach-ache, I can't feel it for him.

Q. So that your opinion is very largely based on what Mr. Connell told you—isn't that so?

A. My opinion of what?

Q. Of his condition—of the cause of his atrophy.

A. Well, I have to take his word that he was hurt.

Q. And take his word that he had a discharge of the bowels?

A. Oh, yes; I didn't see that.

Q. And you took his word that he had pain in the leg?

A. Oh, yes, sir.

Q. And rely upon the fact that while he was being measured that he did not contract his muscle so as to diminish the size of his leg?

A. I don't believe he can do that without my noticing it.

Q. Haven't you expressly sworn, in just so many words, that where a man wants to do it, he can do it, unless there are at least four persons present?

A. Do I say four persons?

Q. Three or four persons present.

A. I don't think so.

Q. Wasn't this question asked you, and didn't you give this answer: "Isn't it a recognized fact that you can't determine accurately the difference in the length of the leg unless the patient is subjected to an examination of not less than three persons to see whether or not the hip bone is moved by the muscles in the slightest

degree? A. I suppose if a person was attempting to deceive
354 it might take two or three to watch him while one was measuring him?"

A. I said might; I didn't say absolutely it would take three or four.

Q. That is your answer, is it?

A. It might.

Q. But you make the answer here——

A. It might take three or four.

Q. It might take three or four to watch while one was measuring?

A. It might.

Q. Was that your answer? Answer that.

A. I presume I said that. I don't know now; that is a good while ago. I simply say it might. I don't say it would require three or four.

Q. Was this question asked you, or this answer given: "I don't know; it all depends on the shrewdness of the examiner. You have to watch them pretty close." Was that your answer?

A. I think it was.

Q. In order to determine accurately in a case like this, isn't it necessary to render the person to be examined oblivious to what is around him by the use of some anæsthetic?

A. No, sir.

Q. I can make my hand shorter than the other by a movement of that kind (illustrating). How is that done?

A. Is it shorter?

Q. I say apparently shorter?

A. No, not apparently shorter; the arm is.

Q. That is the distinction you make?

A. If you want technicalities, I want to do it, too.

Q. Is it necessary to produce a bloody discharge other than dysenteric in its nature, that there should be a lesion or a rupture in the bowels?

A. Let us hear that question once more.

355 Q. Supposing that a discharge from the bowels is other than that of a dysentery, discharge is bloody, remember, but is something else besides dysentery, wouldn't that indicate a rupture or a lesion in that region?

A. I should take it it was a lesion of the capillary blood vessels in the mucous membrane of the bowels.

Q. Wouldn't that immediately produce prostration on the part of the patient?

A. That would depend on the amount, the quantity of blood that was thrown out.

Q. Supposing it was so copious that the patient stooled four times in the night, we will say; copious, you will remember, is the language I employed.

A. I would want to know what you mean by copious?

Q. You found a corn on his foot?

A. No, I didn't find a corn, properly speaking; I found a large

callous spot on the bottom of his foot, covering the whole ball of the foot.

Q. Did you ever see a foot in your life that did not have some callous material on it?

A. Not like that.

Q. Didn't you say at the last trial of this case, that there was some calloused matter there?

A. You showed me some calloused matter.

Q. Which foot is it, by the way, that is injured?

A. I would not say. I would have to refer to my evidence or examine him again. I didn't keep that in my mind.

Q. Do you know which foot it was you did examine?

A. I examined both.

Q. Which foot is it that has the most callous on it?

A. The one that is diseased.

Q. Which foot is that?

A. I think it is the right; I would not say.

356 Q. You did not know until Mr. Hynes suggested it?

A. I don't know, now. I can very soon demonstrate to the jury that I do not make any mistake about this.

Q. If that foot was injured, the shoe would naturally be worn more where it strikes—that is, on the ball?

A. Yes, sir.

Q. The heel would not be worn at all. If I strike this way, that is, strike the heel, why, the heel of the shoe would be worn more than the heel of this—is that right?

A. The foot that drags where it strikes the toe—it would be worn there.

Redirect examination:

Q. Mr. Trude asked you whether it was possible for a person, by producing a rigidity of the muscles of one leg, to make it apparently larger or smaller than the other; I will ask you whether it would be possible for any one to produce a rigidity of the muscles without your detecting it?

A. No; it would not.

Q. You can tell whether there is rigidity of the muscles or not?

A. Yes, sir.

Q. So if there was any attempt of that kind to make one larger or smaller than the other, you could have determined it in the examination?

A. Very likely, indeed.

Q. Was there any such attempt?

A. No, sir; there was not.

Q. No rigidity?

A. No, sir.

Recross-examination:

Q. Much of your examination of this man depended upon what he said?

A. No; I took the measurement actually.

357 Q. You have already stated you might be deceived unless you had two or three assistants with you?

A. No; not in that way.

Mr. HYNES: You measured with a tape-line, didn't you, Doctor?

A. Yes; I measured with a tape-line.

The plaintiff then rested and the defendant introduced the following testimony in rebuttal.

RUFUS N. PILE recalled.

Direct examination by Mr. WILLARD:

Q. Do you know whereabouts in Philadelphia the defendant's passenger station was in 1880?

A. In West Philadelphia.

Q. And from that point their trains started and ran direct to Jersey City?

A. Yes, sir.

Q. Did your department receive any telegrams from Mr. Daniels as ticket agent, regarding the discontinuance of coupon tickets reading by the way of the Baltimore and Ohio on or about the 1st day of December, 1880?

A. Yes, sir.

Q. Have you that telegram?

A. Yes, sir.

Q. You may read the telegram in evidence (referring to paper marked Exhibit "A").

A. "St. Louis, Missouri, December 1, 1880. To L. P. F."

Q. Who does that mean?

A. L. P. Farmer. "Tickets reading via Baltimore and Ohio to points east and north of Philadelphia have been ordered off sale. G. H. Daniels."

358 Q. You may state whether or not that was received in answer to any communication which your department had sent to Mr. Daniels upon that subject?

A. It was.

Q. What was the communication, a telegram or letter?

A. A telegram.

Q. Have you that telegram or a copy of it?

A. I have, sir, a copy of it.

Q. Have you a letter-press copy of it?

A. I have, sir.

(Witness produces letter-press copy.)

Q. You may read it in evidence.

A. "December 1, 1880. George H. Daniels, Wabash, St. Louis & Pacific railroad, St. Louis, Missouri. On receipt hereof please discontinue sale of tickets to all points north and east of Philadelphia, reading via Baltimore & Ohio railroad and this line. Please answer. L. P. Farmer."

Q. Mr. Pile, in a telegram read in evidence from Mr. Coles to Mr. Daniels is a request for Mr. Daniels to continue the sale of tickets, and that they, the Baltimore and Ohio Railway Company, will protect. In what way would they or might they protect?

(Objected to by counsel for defendant.)

The COURT: That would be calling for his judgment simply as to what the Baltimore & Ohio would do.

Mr. WILLARD: In what way might they thus protect?

(Objected to by counsel for plaintiff.)

Mr. WILLARD: I expect to prove——

Judge SMITH: I object to his making a statement of what he expects to prove.

The COURT: We cannot very well keep that out; they have a right to get before the next court, if it should ever go there, their position, in order that it may be seen whether this court is
359 right or wrong. While, of course, it is made in the presence of the jury and liable to have some effect, I cannot avoid it. You may state what you expect to prove.

(To which ruling of the court counsel for plaintiff then and there duly excepted.)

Mr. WILLARD: I expect to prove, and offer to prove, by this witness, that the Baltimore and Ohio might thus protect the tickets which they asked Mr. Daniels to issue, by taking them up between Baltimore and Philadelphia, and giving to the passenger instead a regular ticket issued by the Pennsylvania Railroad Company.

The COURT: Daniels, I understand, was the agent in St. Louis?

Mr. WILLARD: Yes, sir.

The COURT: And you instructed him, you say, from that letter, to discontinue the sale?

Mr. WILLARD: Yes, sir.

The COURT: And he informed you the sale would be discontinued?

Mr. WILLARD: Yes, sir.

The COURT: It is a statement from the Baltimore and Ohio, an outside third party to Daniels, to continue the sale. What do you care as to how they might do it? Anything your company, the defendant company, did, is proper enough, but I cannot see what the Baltimore and Ohio did is competent. The objection is sustained.

(Exception by defendant.)

Cross-examination waived.

360 *Dr. Edward W. Lee.*

Direct examination by Mr. TRUDE:

Q. What is your occupation?

A. Physician and surgeon.

Q. How long have you been such, Dr. Lee?

A. Since 1862.

Q. Are you a graduate of any institution?

A. I am graduate of the College of Surgeons in Dublin, Ireland.

Q. Have you a certificate from the State board of health?

A. Yes, sir.

Q. Please state what, if any, official positions, or what position you hold in connection with the hospitals?

A. Surgeon of the county hospital.

Q. For how long have you been connected with that institution?

A. Seven or eight years.

Q. I will ask you if you made any examination of the plaintiff in this case?

A. I made an examination in conjunction with Doctors Lyman and Isham, at Dr. Isham's office.

Q. State whether you measured his legs?

A. Yes, sir; I measured his legs.

Q. Go on and state what you found, Doctor, as a result of that measurement?

A. I forget which leg is claimed to be affected, but the one he claims is affected I found invariably smaller in circumference than the other one, varying from a quarter of an inch to half an inch, I think, if I recollect right; in the thigh—in fact, it is between the hip and the knee. It is quite a common thing for a discrepancy to exist in the circumference of limbs, and in the length also.

361 Q. Is it a rare or a frequent occurrence to find these discrepancies in the size of the hands and feet and legs?

A. Oh, it is quite a common thing.

Q. I will ask you whether or not you made measurements with the view of being more precise, of the patients that are at the hospital, as to their legs?

A. Yes, sir; I at one time did.

(Objected to by counsel for plaintiff.)

The COURT: He can tell what experience he has had in that direction.

(Exception by plaintiff.)

A. I have measured the legs of patients, selecting those whose legs had not been injured at any time, where there was no history of any injury existing, and I found discrepancies existing in the measurement of these limbs repeatedly with reference to length and circular measurement.

Q. Were those legs afflicted with atrophy or anything or absolutely, perfectly sound legs?

A. There was no history of any injury to those legs that were examined. I asked these patients, first, if they had ever received any injury, any fracture or any injury to the limb or limbs, and received that reply.

Q. State the difference more in detail, Doctor, with reference to length and circumference?

A. It varied all the way—there was one man, there was a difference of an inch and a quarter in the circumference of his thighs. That man claimed he had never sustained any injury to his limbs.

(Counsel for plaintiff objected to the answer and moved that it be stricken out. Motion sustained. To which ruling the de-
362 fendant then and there duly excepted.)

Q. Did you measure the legs with reference to the length of the two legs of any person?

A. Yes, several times on other occasions. Discrepancies frequently exist. There will be as much as half an inch difference sometimes in the length of the leg.

Judge SMITH: Can a man walk without limping?

A. There could be three-quarters of an inch and a man walk without limping. There is compensation in it; you can raise or lower at will. It is possible to raise or lower the pelvis.

Q. Now can you illustrate down here to the jury so they will see it?

A. (Witness illustrates.)

Q. Your legs are all right, are they not, Doctor?

A. Yes (illustrating); I shorten that without any apparent difficulty, yet it is an inch or over an inch and a quarter shorter now; perhaps more than that.

Judge SMITH: It seems to me this is trifling; the man stands on one foot, so can I; I can stand on one foot as well as the doctor.

Mr. TRUDE: Doctor, where there is a discrepancy between the length of the two legs, the hip and the pelvis, as I understand it, forms its own adjustment of the situation, and they walk without any limping, do they not; there is no limp to be observed?

A. A certain extent of shortening—actual shortening, can exist without lameness. I examined the legs of this plaintiff and found that the circumference of his one thigh was smaller than that of the other.

Q. What is atrophy? Explain that to the jury.

A. Atrophy is a wasting. I saw not the slightest evidence
363 of disease at all in either of his legs. I found nothing in the condition of the plaintiff's legs inconsistent with perfect health.

—. Doctor, what is dysentery?

A. Dysentery is an inflammation of the lower end of the bowel, characterized by mucous and bloody discharges. It is very frequently malarial. Injury to the sciatic nerve does not produce it.

The examination of plaintiff was quite protracted, it may have lasted an hour or an hour and a quarter.

Q. Suppose Doctor a person was afflicted with an injury of such severity as to produce a lesion, and a discharge through the medium of the bowels, the discharge being of a bloody nature; state whether a patient who receives such a blow would be able to walk around and endure the fatigue incident to a journey of some hours' duration, or would not such an injury prostrate him and send him to his bed?

A. An injury which would produce hemmorrhage from the

bowels immediately after must of necessity be of such violence to incapacitate the patient for locomotion.

—. A change of food and water, are they not causes for dysentery?

A. Changes of food, water, climate.

Q. I will ask you whether or not Washington and the District of Columbia is not a malarial district—known as such?

A. I believe so.

Q. Where a person receives an injury consequent upon a blow to the back of such severity as to cause a copious flow of blood through the medium of the bowels, state whether or not that injury would indicate anything of a dysentery order or not.

A. No; if there is direct hemorrhage there must be a
364 rupture. The blood, would, of course, either be veinous or arterial, according to the vessel it came from.

Q. In that event, wouldn't the individual thus afflicted be prostrated so as to be unable to move around at all, or move with the greatest difficulty?

A. Yes, if the violence was of sufficient force as to cause a rupture, it must be of necessity great.

Q. Doctor, assume that an individual was injured in the month of December, 1880, and that in the month of June, 1882, he fails to find any evidence whatever of atrophy or injury to his leg, what would you state as to an injury which was discovered, we will say, a year later, being traceable to the injury he received in 1880—that is, he discovers it three years after the injury?

A. If the symptoms were three years delayed, I should not connect it with the injury, or even two years, or one year.

Q. What would you say if it was only two years delayed? Isn't it true that where atrophy sets in as the result of an injury, wouldn't it make itself manifest immediately or very soon?

A. It ought to for an injury of the nerve. If an injury of the nerve is received at the time the violence is given, there is an inflammation set up in the nerve structure, the impairment of the nerve function existing from the time of the injury. The tissues always waste when the nutrition is interfered with, and the moment it is interfered with.

Q. Now, could you possibly trace any wasting away; that is, there would be a suspension, we will say, of waste—an absolute suspension of waste, so that the patient that is injured in December, 1880, regains a condition of perfect health by June, 1882, and then in 1883 discovers, or claims to discover, that he has atrophy on one
365 of his limbs? Now, Doctor, would you say there was any possible connection, near or remote, between that injury and the atrophy referred to?

A. I should not think so.

Q. If the sciatic nerve of an individual was injured would it not make itself manifest in both legs alike?

A. If the sciatic nerve was injured the manifestation will only be evident over the limb which it supplies.

Q. Describe to the jury the functions of the sciatic nerve; what office it performs.

A. The sciatic nerve passes out through the pelvis or the frame of the body, through a notch; after it emerges through that notch it becomes sciatic; it is not sciatic until it emerges, and then it passes down along the back of the thigh, and after it gets below the knee it splits in two, and then further divisions until it terminates at the foot, supplying the muscles all the way down.

Q. In speaking about the leg, these nerves, and so forth, you are the same gentlemen that treated these bomb-struck policemen, are you not?

(Objected to; objection sustained; exception by defendant.)

A. I have the usual experience of a surgeon in active practice; that is all.

Q. If that nerve is struck in the back would it affect both legs or only one of them, likely; the nerve is a channel, isn't it?

A. If the lower part of the spine is injured where these nerves originate, then both sides ought to be equally affected.

Q. And the fact that they were affected would make itself manifest immediately, wouldn't it?

A. Yes, sir.

Q. Now, is there any connection between these nerves that
366 run down the leg you have described here, and the bowels?

A. The bowels are supplied with nerves from the lower end of the spine, partly from the same plexis that the sciatic comes from.

Q. Would such an injury to that part of the body, as described by Mr. Connell, be liable to produce dysentery?

A. No, sir.

Q. Doctor, did you examine Mr. Connell's feet?

A. Yes, sir. I saw some welts or callosities on one foot, a patch; thickened skin. It is not, properly speaking, a corn; it is a welt. It is quite common to find them. They come from tight and ill-fitting shoes; tight shoes.

Q. I will ask you whether or not a person may not by the exercise of will power enlarge or diminish the size of his arm or leg by contraction of the muscles?

A. By contraction of the muscles the diameter of a leg or limb can be increased, that is the fibre contract, and there is an additional amount of blood sent into the muscle which has the effect of increasing its diameter. You may increase the size of your arm or diminish it by the contraction of the muscles, by shutting the hand of that particular arm, and the same with reference to that particular leg.

Q. Did you see any difference in the shoes that were worn by Mr. Connell?

A. No, there was not any difference in the shoes that I saw; I didn't notice any difference.

Q. Supposing, Doctor, in the month of December, 1880, a person sustained an injury to his spine; that shortly thereafter he suffered

from dysentery, or bloody discharges from the bowels; that he kept from that time getting better and better until the 14th day of June, 1882, he was well, in good physical health; that there was nothing the matter with his leg or either of his legs, with his
367 arms or any part of his physical frame; and that a year after that he discovers that one of his legs is diminished in size from the other; would you say there was any possible connection between the diminished size of that leg and the injury he received in December, 1880?

A. I don't see any possible connection with an interval of that length where the patient enjoyed perfect health.

Cross-examination by Mr. HYNES:

I could not say there was any effort by the plaintiff to enlarge his leg by producing rigidity of the muscles when I examined him; I could not say that there was; such a thing did occur, but it was only under direction, when he was directed to stand on one leg.

Q. Is it a fact, Doctor, that these measurements that you have given to the jury as having been made on the patients are the average of a number of measurements you made, finding some of them more, some of them less, on that occasion?

A. Yes, I measured several times during that examination, finding them sometimes more and sometimes less. The measurements I have given to the jury are my judgment, striking an average.

Q. Now, I will ask you whether at one time, when making a measurement of Mr. Connell's leg, he did not call attention to the fact that there was the difference of an inch there?

A. Yes, sir. I did not contradict him. I took some notes, but haven't them now.

Q. An injury to the sciatic nerve will produce atrophy of the leg supplied by that particular nerve?

A. Yes, it will impair the nutrition of the leg.

Q. If it does produce atrophy or wasting, is it an indication that the injury was a severe one, that the violence was con-
368 siderable?

A. Yes, sir, it is an injury, it is an indication that the nerve trunk sustained an injury whereby its functions were impaired.

Q. When you speak of atrophy, Doctor, you speak of a result of a fact, of a symptom, an evidence of a diseased condition, do you not?

A. One of the evidences of a diseased condition. Atrophy is an impairment of nutrition. Impairment of nutrition is brought about by injury to the supply—to the nerve.

Q. Is it not a fact that atrophy, as a result of that injury, sometimes occurs at distances varying all the way from a few months to a few years, depending upon the progress of the disease of the nerve?

A. That is not my experience; I don't think so.

Q. Is it not a fact, Doctor, that the discovery of wasting, or atrophy, is sometimes made long after the wasting has set in, and

will not be noticed by a patient often until his attention is called to it by a doctor's examination?

A. That might occur. I have not found it so in my experience. It is quite possible I may have made examinations and apprised my patient for the first time that there was atrophy of some part.

Q. Assuming the right leg was fully as large before this injury, and without any injury except this, a year or a year and a half after you discovered atrophy of the right leg, and that the wasting progressed as years passed on, would you say that there was atrophy of that limb, and would you attribute it to that injury, in the absence of any other cause?

A. I could not connect it with that injury without more positive proof as to the lesion at the time.

Q. If there were no other cause apparent would you, as a medical man, attribute it to the injury?

A. No, sir, I would not.

339 Q. You are, I believe, the surgeon of the defendant railroad company here, and have been in their employment for that purpose how long?

A. Somewhere about twenty years. It was originally the Pittsburgh, Ft. Wayne and Chicago, but now it is the Pennsylvania Company. I am their regular surgeon. I am employed by them.

Q. Is it not a fact that a person may receive a shock, and that paralysis will follow from that as long as a year after, when there are no immediate consequences apparent at the time of the shock?

A. I don't think so.

Q. Atrophy is something that developes gradually, is it not, Doctor; it does not come all at once?

A. No, sir.

Q. It is a wasting that takes place and does not often discover itself until it has progressed to a considerable extent?

A. It is quite possible it may not be.

Redirect examination by Mr. TRUDE:

Q. When you are sent by the defendant to examine cases, you are to ascertain the truth—to ascertain the condition of the patient, are you not?

A. Yes, sir.

Q. Where a man is injured, you report that injury, and where he is not injured, you report it, do you not?

A. I report exactly what I find.

Q. You report the truth, whatever it may be?

A. Most assuredly.

Dr. Ralph N. Isham.

Direct examination by Mr. TRUDE:

Am a practicing surgeon and physician, and have been
370 since 1854. I graduated in medicine in the University of the City of New York. Served an apprenticeship in the Bellevue hospital, and here in Chicago. I have been engaged in that

practice ever since in this State, and been connected more or less with hospitals during that time, and have done something in the way of teaching, for twenty-five years or more, in the Chicago Medical College.

Q. Were you connected with a hospital in the city of Chicago—the Marine hospital—at any time?

A. Twice; once under President Lincoln's administration, and once under Gen. Grant's.

Q. I will ask you if you have any connection with the city as surgeon?

A. No official connection. I have been called upon, and have appeared in several cases, as medical expert; I suppose that would be the proper definition. I have examined persons who had claims for injuries. I examined the plaintiff twice; the first was on one of the previous trials of this case—I think in December, 1882; and the second time on the occasion of the last trial, which was perhaps a year ago.

Q. Please state the result of those examinations.

A. Some of my examinations as regards the effects of the alleged injury were perhaps of a negative character; that is, I failed to find anything which I could attribute to an injury; that might be reenforced by the statement of the patient at the last examination, when he said himself he was pretty well, or very well—in good health. Much was said about his legs; a good deal; and I have examined him twice. At the second examination the patient was stripped to expose both legs, and they were measured. At that time there were present, and participated in this examination, Dr. Lee, who was just present, and Dr. Lyman, I think, besides
371 myself. The curious feature of that examination was, none of those measurements agreed at the hands of different individuals.

Mr. HYNES: I move that the doctor's comment be stricken out.

The COURT: Strike it out; it was not in answer to the question; exception by defendant.

WITNESS: My first measurement—that is, this last examination—has reference, of course, to the thigh. I don't think there was any question as to the condition of the legs below the knee. My first measurement was of the right thigh, at the conjunction of the middle with the upper third. It was eighteen and three-fourths on the right side, and nineteen and one-fourth to the left. That is about ten inches above the knee-pan. Well, below the knee I made it thirteen and one-fourth by the right leg and thirteen and one-half for the left. Then another measurement of the right thigh was eighteen and one-half and eighteen and five-eighths of the left, and another measurement, eighteen and three-fourths to the right, and nineteen and one-fourth to the left. Then there was a fourth measurement, which I have noted here, made by Dr. Lee, so I do not suppose it is pertinent to this.

(Counsel for defendant offered the memoranda in evidence.)

(Objected to by counsel for plaintiff.)

The COURT: Ask him whether he saw Dr. Lee make that.

Mr. TRUDE: Did you see the measurements made by Dr. Lee?

A. Yes sir.

Q. In the presence of Mr. Connell?

A. Mr. Connell, of course; he was the subject of this examination; he must necessarily have been present.

372 The COURT: He may not state any conclusion Dr. Lee reached, or what Dr. Lee did, unless he was assisting him in the examination. You can't call one expert to state what another expert did, and give any conclusion the other expert reached, especially if he has been on the stand himself. The objection is sustained if it relates to the examination made by Dr. Lee, who has been on the stand.

(Exception by defendant.)

Mr. TRUDE: How would it be if it appears that the examination made by Dr. Lee was in the presence of Dr. Isham and in the presence of Mr. Connell?

A. That won't make any difference; you have had Dr. Lee on the stand.

(Exception by defendant.)

WITNESS: What I discovered there was, as I said before, largely of a negative character. The difference in the measurement arose from the difficulty which pertains to the making of a very accurate measurement of what may be described as soft elastic tissue, in contradistinction to hard, resisting, or inelastic substance. The condition I found there was one not at all incompatible with a healthy condition of the limb; it was a physiological condition. I so regarded it as such; that is, a condition compatible with perfect health, and that was confirmed in my mind because of the entire absence of any indications of disease, such as would arise from impairment of nutrition from defective nerve supply, or innervation, as the term goes, which would be, in such cases that, associated with changes of color, changes of temperature, changes in sensation, changes in mobility or ability to use the limb.

Q. Was there anything in his limb or limbs inconsistent with perfect health?

A. Not in my opinion.

373 Q. I will ask you whether or not a patient could so feign as to deceive a doctor while engaged in measuring his limb and legs, both up and down and around?

A. I should hardly think so; that is to say, I don't suppose a person could make such a tension or disposition of his muscles that I could not detect it. The contraction of a muscle in its effect is notably familiar to anybody, I think, because of the change in the size of an arm by contraction and by expansion.

Q. May not a leg, its size, increase and diminish in response to the will of a patient?

A. Yes, sir, by the voluntary contraction of the muscles. Still I think I should recognize that fact if it was done.

Q. Assuming there was a difference in the size of Mr. Connell's leg, as measured by different persons, how would you account for it?

A. Well, it arises from the difficulty of making an exact measurement of tissue that is elastic, that is compressible, that is not firm, like a piece of wood. It would be the difference between measuring a log and measuring a bag of feathers; you are liable to a little error; in order to make an exact measurement of an elastic substance of that sort, you have got to have a measuring instrument, or the instrumentality broad enough to include quite an extent of surface to overcome that difficulty.

Q. Did you resort, when measuring Mr. Connell the first time, to any mechanical contrivance to give the circumference?

A. The first time I measured him was here in the court-room. I repaired from the court-room to an adjoining room to measure the leg. I was there to examine his legs, and the question of measurement came up, and I had nothing in my pocket, and I made use of one of those cords attached to the window, and I did not
374 make any appreciable difference, any measurable difference, in the circumference of the leg at the point where I measured. I only measured them with the cord at that time. The second time was in my office, on the occasion, I think it was, of the last trial, and I measured his legs at various places, and many times, with the view of determining, if I could, the exact difference. A good deal of stress had been laid, in the meantime, on the difference in the size of his legs, and those are the results that I have just given.

Q. Could you discover any disease at all of the sciatic nerve, or any evidence that the sciatic nerve was diseased?

A. No, sir; or that its functions were impaired.

Q. Tell the jury what the sciatic nerve is, please, and what its functions are, as well.

A. The sciatic nerve is the nerve which is distributed to the lower extremity, or one of the nerves. It is the largest nerve in the body, and perhaps the longest. That is made up of a number of cords that are derived from the spinal cord that unite and pass out of the pelvis through the sciatic notch along the posterior aspect of the leg or limb, and extends down below the knee, and is distributed through the parts below. It is a mixed nerve of motion and sensation, and is painfully indicated to some people who are afflicted with that affection called sciatica. A blow may be so severe as to paralyze a nerve at once. It may be only to that extent that inflammation is induced, and the function of the nerve measurably or appreciably interfered with. Presumably, in all cases of an injury to the nerve, the consequences would be consecutive, would be continuous towards recovery, or towards the pathological condition, whatever it may be. Continuously, without an interval of time.

Q. What would you say of a suspended condition, that
375 lasted over a year in duration?

A. Well, I want to be understood as confining my answers to the specific question of injury of the nerve. That must be care-

fully distinguished from a functional disturbance, which might arise from climatic influences, such as neuralgia; you must draw that distinction, and an injury of the nerve, as I have just said, and I repeat. is followed by consequences which tend toward a recovery or tend to a pathological state, a diseased state, uninterruptedly.

Q. Assuming that a person was severely injured in the month of December, 1880; that shortly after the infliction of this injury (a blow to this sciatic nerve) the person injured defecates; that the stool is bloody, the evacuations frequent, the same night three or four times, and all of them very bloody; that the patient treats himself in no other way except by applying porous plasters; does not seek a surgeon, or anything of that kind; goes home and attends to his business more or less, and in June following, that is, in June, 1881, announces himself in general good health; that a year after that he discovers that his right leg is diminished in size, and there is atrophy of the leg. What would you say, Doctor, of that condition being traceable to the injury which he received in 1880?

A. You assume that there was an injury in 1880. In the meantime he has had this experience of bloody discharges. You asked me how to account for one leg being smaller than the other, three years after the accident. I cannot account for it.

Q. Is there anything in the literature of your profession or your knowledge of the profession you practice, that enables you to tell how such a condition exists?

A. No.

Q. Could you trace it to the injury?

A. No.

376 Q. Did you ever hear of a case like the one I have described in your life, Doctor?

A. No, I should say not. I ought to state there, perhaps, if it is proper, a qualification to that answer. That supposititious question is singularly defective in the case of an injury to the sciatic nerve.

Q. Your idea of dysentery is what?

A. Dysentery is a disease which is characterized by bloody discharges of a peculiar character that are the result of a congestion or sometimes of ulceration of the bowels, produced by most frequently telluric influences, as they are technically called; this is expressed by using the word malarial.

Q. Is dysentery ever produced by a severe blow on the back in the region of the sciatic nerve or on the sciatic nerve?

A. Dysentery is never produced by an injury.

Q. Where a blow on the back and upon the sciatic nerve is of sufficient severity to cause a copious flowing of blood from the bowels, what effect would that have upon the patient with reference to being able to walk?

A. A blow upon the back sufficient to produce a copious discharge of blood from the bowels necessarily implies a degree of violence sufficient to produce, I should say, almost a total disability of the patient at the time the injury is received.

Q. Unable to walk?

A. I should say so. I should assume that. Certainly it would

be associated with such symptoms of shock as the result of the violence that would create a good deal of apprehension about the patient. He would demand assistance, medical skill, a good surgeon.

Q. What would you say of a man being struck on the body and the sciatic nerve being injured and all the effect was that
377 when he went to the water-closet there was simply a bloody discharge?

A. You cannot strike a man in the back and injure the sciatic nerve.

Q. Strike him so that his sciatic nerve is affected?

A. A man struck a blow across the back or struck in the back, as your expression has it, producing an injury of the sciatic nerve, would involve a cord, and it would be manifest elsewhere than in the sciatic nerve.

Q. Where would it be manifest?

A. All those parts that are supplied with nerves distributed from below the seat of injury, from the cord.

Q. He would not be able to go around town and go home and travel thousands of miles, and have no other treatment but a porous plaster, would he?

A. Not after such an injury as you suggest.

Q. State whether or not atrophy would make itself manifest right after the injury if the injury was the primary cause of the atrophy.

A. You should draw a distinction between atrophy and emaciation. Atrophy is the result, or a shadow, as it were, of a condition, which—take the atrophy of a leg, which I suppose you have uppermost in your mind—atrophy of a leg may arise from several causes, the disability of a nerve, interference with the functions of a nerve will produce an atrophy of the parts by which that nerve is supplied, and generally, in common language, when we talk about atrophy of a leg we mean atrophy or waste of the muscles of the leg, generally; that is, it is more apparent in that way than any other, but atrophy may be produced in a way that is perfectly compatible with health, as, after a broken thigh, we keep it, as we say, put up for eight or ten weeks in bandages or appliances for the purpose of mobilizing the limb; we find, when taking down
378 those bandages, the limb is atrophied, but by friction used to encourage the circulation and improving the nutrition of it the patient overcomes that. Atrophy then may be produced in two ways, by anything which interferes with the innervation of the part, that is, through the supply of nerve force through the nerves or interference with the circulation of the part. Those two conditions of circulation and innervation are essential to the well-being of the parts; anything that interferes with the circulation or innervation will produce atrophy of the parts which are dependent upon those two supplies for their nutrition.

Q. When you examined Mr. Cornell's leg you found no evidences or traces I understand——

A. I found nothing there which I did not regard as a physiological condition; that is, as perfectly compatible with health.

Q. Something has been said about his foot; did you find anything on his foot?

A. Yes, sir, I did; he had a corn on the outside of the little toe, that is at the meta tarsal phalangial joint, that is at the base of the little toe. He had one on the sole of the foot at the base of the great toe, and then he had one at the opposite side at the base of the fourth and fifth toes, and I have made a note here that the latter toe was from half an inch to three-quarters of an inch in diameter. The two on the sole of the foot, and then there was one on the outside of the little toe, making three in all.

Q. Was there any evidence of disease there; did that suggest anything of an injury?

A. I, of course, examined those, and I examined his shoes, and I noted his walk, his gait, as the expression goes, to satisfy myself as to whether those were produced by any peculiarity of gait, any
379 interference in easy locomotion. The shoe is the best tell-tale, as it were, in that regard, and examining the sole of the shoe I found it was worn evenly like the other one, which, if these corns were produced by walking on his toes, would, I think, show by the shoe, the toe of the shoe being kicked out quicker than the rest of the sole.

Q. Was there any evidence of calloused skin, or whatever it may be termed, in the parlance of your profession, on the ball of the foot?

A. Yes, sir, at the base of the big toe. I am talking about the sole. The average public, when they talk about the ball of the foot, I think they have reference to this favorite seat of bunions on the inside of the foot, but not on the sole.

Q. You say the shoes were worn just alike that you saw?

A. I examined the shoes with reference to determining that, and I saw there was nothing about the wear of the shoes that showed that he walked on his toes. I did not see that he walked on his toes. I did not see that about his gait; his gait seemed to be good enough.

Q. What would you say those corns were traceable to, then? Anything unnatural in any way or remarkable in them?

A. I suppose we have always had had more or less experience with corns. There was nothing about them except they were unusually large. How long they have been there I don't know; perhaps a great while. They did not have the appearance of being of recent condition.

Q. Did you have a conversation with him as to his injury and as to his version of the accident at the last examination?

A. At the last examination the history of this case was detailed by the patient himself from a written statement.

Q. What did the patient say to you as to his injury?

380 (Objected to because the witness says it was in writing.)

Q. From the statement made to you and from your examination of that man as to the right leg being smaller than the left leg, what

is your opinion as to its being the result of the injury which he is alleged to have received?

(Objected to on the ground that what he said he read from the paper; objection overruled; exception by plaintiff.)

A. It was my opinion that it was not due to any injury. I did not find any condition there that could be attributable to the injury, in my judgment.

Cross-examination by Mr. HYNES:

Q. Do you mean you did not find any conditions from the statement that he read to you?

A. From the history of the case and from examination, I did not find any result of an injury.

Q. From the history of the case as he read it to you, will you answer, please?

A. From the history of the case, as I understood it from that interview.

Q. Did you learn anything at that interview except from the paper that he read?

A. To a great extent I did.

Q. Did he say anything to you about the history of the injury, except what was read to you from the paper?

A. There was a general conversation all along.

Q. About the history of it?

A. He said in answer to a specific question which I made, and which is usual with me, he stated that all had been said regarding his injury and their effects.

381 Q. In the paper that he read?

A. That embraced some of our conversation, which also included his statement that he read from the printed paper.

Q. I will ask you to state whether he made any statement to you about the history of the injury, except through the medium of this paper?

A. Oh, I think so.

Q. Isn't it a fact that he declined to make any statement, but he said he would read it to you?

A. He did not decline to make any statement.

Q. Didn't he say when asked for a statement that he would read it?

A. Yes, sir; he took out of his pocket a paper premising what he did, by saying that it would save time if he read it.

Q. Now you say it is usual with you to put the question to persons under those circumstances, as to whether all had been stated?

A. Whether there was anything that he could recall, anything about the case that he could recall.

Q. Did you make a minute of that question; I see you reading from a memorandum?

A. My minute reads thus: "Patient said that all had been said regarding his injuries and its effects. But further said in answer to a question by Dr. Lee that he had no physician until nine days

after the accident when he had reached Omaha." Those notes imply a conversation. There was no other conversation there except as to this man's injuries and its effects. There was no other subject of conversation during that interview. It is not to be assumed that I went into that examination and he shut his mouth and said nothing.

Q. But do you recollect that he did anything more than read that?

382 A. I do recollect one item of conversation in explanation of the manner in which the injury was received. That was explanatory as to the manner in which he struck against the crossbeam of the car, and I think he indicated by his hand the location of that injury.

Q. Don't you remember where he put his hand, where he indicated he received the blow?

A. On the back, over the crest of the ileum, over this circle of bones here.

Q. That is not the spinal column is it?

A. No, sir.

Q. Did you not state in your answer that if there was such a blow on the back that it would involve the spinal cord?

A. Yes, sir.

Q. Would a blow anywhere on the back, this broad surface that you now explain it to mean, produce an injury to the spinal nerve?

A. I have a distinct recollection of that question of Mr. Trude's, and——

Q. Did you not say in response to it that it would produce an injury to the spinal cord that would affect the functions below the seat of the injury?

A. I can explain that question.

Q. What is it?

A. The question is whether an injury on the back producing impairment of the functions of the sciatic nerve would do thus and so, and my answer was that such an injury producing an impairment of the functions of the sciatic nerve would imply a disability at once. It don't make any difference what part of the back, any portion of the back that will interfere with the functions of the sciatic nerve.

Q. Could not a blow in the posterior here that did not touch the spinal column produce an injury of the sciatic nerve?

A. That can be so, certainly.

Q. Isn't that where he claimed he received that injury?

A. I don't think it was.

383 Q. Where was it?

A. Right here (indicating).

Q. That is not near the spinal column?

A. No.

Q. You do not think atrophy will set in unless it sets in so that it will be observable before six months?

A. An injury to the sciatic nerve sufficient to produce atrophy

would be associated with other symptoms that would be observable before six months.

Q. Suppose the injury was not so serious as to produce those results?

A. I do not know in any of my readings and results of any injury sufficient to produce atrophy that would not produce other symptoms likewise.

Q. What other symptoms?

A. Those that interfere with the circulation of the parts.

Q. Those would develop themselves, would they not, in a reduction of the size of the parts?

A. The earlier symptons would be indicated by changes in color and easy responses to changes of temperature and different conditions in the functions of the skin to which the nerves may be distributed, and sensibility.

Q. Do you know whether those symptoms existed or not?

A. Those would come right along continuously and the atrophy is perhaps the final terminate or one of the ultimate symptoms that may be permanent.

Q. Did you make any examination or test as to the temperature of his leg?

A. Only by touch.

Q. Do you mean to say you could tell the difference in temperature in a case of that degree of atrophy between the two legs by the sense of touch?

A. I could not tell the exact difference, of course not.

Q. Isn't it a fact that you had him stripped there until he shivered and you had to put a blanket over him?

A. I do not remember that.

384 Q. Did you examine that left foot to see if there was any of those corns, as you call them?

A. My impression is, there was none on the left foot.

Q. They were unusually large, you say?

A. I think they were.

Q. Did you make more than one measurement of each part?

A. Yes, sir. I made three, to my recollection.

Q. They varied, did they?

A. Yes (referring to paper); I will give you them again. The first and third agreed, the second varied from the first and third with reference to the right leg, or right thigh. The variation between the second and the third was a quarter of an inch. The second was a quarter of an inch smaller. In the meantime, measurements had been made by some of the other gentlemen which did not agree with mine, so I tried it again; so we alternated, I think.

Q. Were the measurements you have given us the result of your own examination and investigations, or are they predicated upon the measurements of others?

A. These are my own measurements.

Q. You measured Mr. Connell in 1882, with reference to the complaint about his leg?

A. Yes, sir. You mean by leg, thigh, of course.

Q. And you found the right one smaller below the knee?

A. No; I found them alike in one instance.

Q. Did you not testify, in your direct examination, giving the figures, that you found the right leg smaller below the knee, and give figures?

A. I found the measurement where there is a difference of a quarter of an inch. The right leg being smaller below the knee.

385 Q. Now, Doctor, in 1882 you measured Mr. Connell when he insisted, and when Dr. Stubbs testified that there was a difference between the two legs; you made an examination then for the defendant company?

A. Yes, sir.

Q. And then did you go upon the stand, after making that examination and testify there was no difference?

A. Yes, sir.

Q. So that in 1882, when you measured, your conclusion was that there was not any difference. When you subsequently measured you found the difference you speak of?

A. The difference is between a physiological and a pathological condition. I said there was no pathological difference.

Q. You found a difference when you examined him a second time?

A. No pathological difference.

Q. Did you find the difference that you have given to the jury in size?

A. In measurement, yes, sir.

Q. I don't care whether you call it pathological or physiological difference. Was there any physiological difference in 1882?

A. I did not see any difference.

Q. Was there any pathological difference in 1882?

A. No, I think not.

Q. There was a pathological difference in 1886, the last time when you examined him, was there?

A. No.

Q. There was a physiological difference?

A. Yes, sir.

Q. So that a physiological change had taken place from 1882 to 1886, had there, in that leg?

A. No.

Q. But you discovered it on one occasion and did not on the other, although at each time you made an examination for precisely the same purpose?

386 A. That is exactly it. The difficulty was in my being unable to make an absolutely exact measurement of a soft tissue.

Q. Did I not ask you when you made the examination in 1882, the examination to which you testified to before Judge Gary, whether the facilities you had were such as to enable you to make

an accurate measurement, and didn't you answer me that they were?

A. Yes, sir.

Q. Are not you the surgeon for the North-western Railway Company?

A. No, sir.

Q. When did you quit?

A. Oh, well, I had not done any work for them for a good while.

Q. How long were you the surgeon for the North-western Railway Company?

A. A good many years.

Q. What other railroad companies have you done service for as a witness?

A. Well, I don't know what you have reference to.

Q. What other railroad companies have you appeared upon the stand as a witness for?

A. I am frequently called upon to give evidence as an expert.

Q. And by the city, too?

A. I have been called upon by them to make examinations oftentimes.

Q. Have you served the city as an expert in cases where they have been sued for personal injuries?

A. Yes sir.

Redirect examination by Mr. TRUDE:

Q. What is the difference between a pathological examination and the other examination referred to by you?

A. The pathological condition is a condition that indicates a disease and the result of disease.

Q. And there was no appreciable difference from that
387 standpoint in this leg at any time?

A. That is my opinion.

Q. Wouldn't it be remarkable if the two legs of any person were exactly alike?

A. It is a very rare thing to find two legs alike on the same individual.

Recross-examination by Mr. HYNES:

Q. Is it not a fact that the right side is usually the larger?

A. I suppose it depends on the occupation of the individual. I do not know as there is any rule about that. I should say probably yes, the right side and the right arm I think is the longest generally, or the right leg may be the longest.

Redirect examination by Mr. TRUDE:

Q. The right arm is the largest because it is more frequently used?

A. Yes, sir.

Q. And this difference to which you refer between these two legs is the difference that nature has created?

A. Yes, sir; that difference is what I mean by physiological difference.

Q. Speaking of atrophy, isn't it true that when it begins it is thereafter continuous: there can be no suspension?

A. Yes; it can stop at a certain point and remain there. We frequently encounter differences in legs that have existed from childhood, from infancy as the result, for instance, of what is called infantile paralysis; that is a familiar illustration of that to a medical man, where the limb remains atrophied to a certain extent.

Q. Atrophy is what?

A. Atrophy is an effect.

388 Recross-examination by Mr. HYNES:

Q. Did you not testify on the trial before Judge Gary as follows: "I suppose, in a usual way, that a right-handed man presents a better development of the right side than the left side"?

A. Yes, sir; that is a supposition of my own.

Mr. TRUDE: Read it all; you omitted the words "There is no rule about that."

B. F. WILSON recalled on behalf of the defendant.

Direct examination by Mr. WILLARD:

This is a time-schedule of trains between Philadelphia and New York, in force December 16, 1880.

Q. What use was made of those schedules?

A. They were distributed along the road at stations, kept posted in the station-houses; that is what they are for; they are generally put in frames.

Q. Do you know, of your own knowledge, whether there was one posted in the station at Tacony?

A. No, sir; I do not.

Q. I think you have already stated what train stopped at Tacony going towards New York, which the plaintiff could take, and by changing at Trenton, reach New York about 4 o'clock.

A. 5.15.

Q. Are you able to state whether the plaintiff, in going down the car steps, struck his body against any portion of the car or steps?

A. I did not see him strike himself; I was in front of him, leading him down the steps.

389 Q. Did you observe any ice on the steps at that time, or that they were slippery for any reason?

A. I did not see any ice on the steps.

Q. Did he, so far as you saw, slip on the steps?

A. I did not see Mr. Connell slip.

Q. If the platform or steps, or either of them, had been icy at that time, would you or would you not have known it?

A. I did not see any ice, did not take notice that there was.

Q. Do you remember having any difficulty yourself in going up or down the steps in respect to ice?
A. No, sir; I did not.

E. R. UBEROTH recalled.

Direct examination by Mr. WILLARD:

Q. State whether or not the plaintiff, in going down the steps at the time he was leaving the car, fell or struck against any portion of the steps.
A. He did not.
Q. He did not?
A. No, sir.
Q. You may state whether the platform or steps of the car were slippery from the presence of ice on them at that time.
A. It was not.

Which was all the testimony given in said cause.

Motion by plaintiff for leave to open the argument to the jury.
(Objection by defendant; objection sustained; exception by plaintiff.)

Motion by defendant for leave to open and close the argument to the jury.
390 (Objection by plaintiff; objection overruled; exception by plaintiff.)

Argument to the jury. Counsel for the defendant made the opening argument to the jury. Counsel for plaintiff thereupon followed and made an argument to the jury; thereupon counsel for the defendant made the closing argument to the jury.
(Exception by plaintiff.)

Instructions Given on Behalf of the Plaintiff.

(1.)

The jury are instructed that under the pleadings and proof in this case, and the admissions of defendant, the ticket presented by the plaintiff to the conductor was a valid, proper ticket, and it entitled the plaintiff to passage over the defendant's line of road, from Philadelphia to Jersey City, at the time it was presented, and the conductor Wilson had no legal right to refuse to accept the same, and demand that the plaintiff pay fare or else leave the train. (Given.)

(2.)

The jury are instructed, as a principle of law, that the remark of the plaintiff to the conductor to the effect that he, the plaintiff, did not propose that he, the conductor, should steal his money, would not justify or authorize the conductor in using unnecessary or excessive force in ejecting plaintiff from the train. (Given.)

(3.)

While it is the law that it was the duty of plaintiff, when
391 notified by the conductor that he would not receive his ticket, to pay his fare, or leave the train, yet the defendant had no legal right to order the plaintiff to leave the train, or to demand his fare in cash, if he tendered to the conductor the ticket in question, and the refusal of the plaintiff to pay such cash fare or leave the train, did not authorize the conductor or brakeman to use any excessive, unreasonable or unnecessary force in ejecting plaintiff from the train. In expelling plaintiff from the car, it was the duty of the conductor and brakeman to use only such force as was reasonable and necessary for that purpose. And if the jury find from the evidence that the conductor and brakeman used more force than was resaonable and necessary in expelling plaintiff from the car, and as the result of such excessive force, if used, the plaintiff sustained personal injuries, then and in such case, defendant is liable for such injuries as the evidence shows the plaintiff received by reason of such excessive and unreasonable force, if you find it was used. (Given.)

(4.)

The jury are instructed that they should wholly ignore any statements of counsel, if any have been made, concerning what the supreme court has or has not said as to the facts of this case, the jury are to determine from all the evidence in this case, the facts in the case, and from the facts so found, and under the instruction of the court, return your verdict. (Given.)

(5.)

The jury are instructed that they should not be influenced in the slightest degree by any statement of counsel concerning mat-
392 ters not in evidence, if any such statements have been made, and they should wholly disregard and reject from their thoughts any and all statements of counsel not based upon the evidence, if any have been made. (Given.)

(6.)

While it is true that the jury, in determining how much credit or weight should be given to the testimony of plaintiff, have the right to take into consideration the fact that he is the plaintiff, and pecuniarily interested in the result of this suit; it is also true that the jury have the right to take into consideration the interest, if any, of any of the other witnesses, and to consider the relation, if any, of any of the witnesses to the defendant or the plaintiff, if any such relation has been shown, and the jury should give to the testimony of each of the witnesses such weight as they think it is fairly entitled to receive.

(7.)

In considering the question of damages, you are further instructed: that if from all the evidence, and under the instructions of the court, you find the issues for the plaintiff, then, in fixing the amount of damages you will award:

It will be proper for you to allow plaintiff the cost of a ticket from Tacony to New York, and such damages as he sustained, if any, on account of the delay occasioned by being required to leave the train; and if you find from the evidence that the conductor or brakeman, in a reckless or wanton manner used more force than was reasonable and necessary for the purpose of ejecting him, and that in consequence of such excessive use of force, if any, the plaintiff was injured, it will then be proper for you to allow him
393 as damages such sum as will fairly compensate him for injuries to his person, if any, as the evidence may show resulted directly from such unreasonable and excessive force, if you find *he* was used, and for bodily pain suffered by him, if any, in consequence of any such injuries; also, such sum as would be a fair and reasonable compensation for loss of time, if any, which the evidence may show he has sustained in consequence of any such injuries; and you are further instructed, that if you find from the evidence that the acts of the conductor in refusing plaintiff's ticket, demanding fare and ejecting the plaintiff from the car, were wilful, wrongful and malicious, and the result of a wrongful and reckless indifference of the rights of plaintiff, and that the plaintiff suffered indignity and injury thereby, then you may, if, after carefully and honestly considering all the evidence you believe you are justified in so doing, in addition to allowing him damages as above specified, also allow him such further sum as exemplary or punitive damages as you may consider proper and reasonable to punish such conduct, and deter the defendant from like conduct in the future. (Given.)

Exception by defendant, to the giving of said instructions and each of them.

Instructions Asked by the Defendant, and Given as Asked.

(6.)

The jury are instructed that they are wholly to disregard any appeal to their prejudices or passions if they believe any has been made, or of statement of counsel not based upon the evidence, if any has been made, and to render their verdict according to the evidence and under the instructions of the court. (Given.)

394 (9.)

The court instructs the jury as a matter of law governing and controlling this case, that when the conductor demanded that the plaintiff, Connell, should pay fare or leave the train that it was his duty, if he declined to pay his fare, as requested, to leave the train,

and that when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for any personal injury which he thus voluntarily brought upon himself through the use of such force as was reasonably necessary to remove him from the car. (Given.)

(11.)

The court instructs the jury that when the plaintiff refused to pay his fare when requested by the conductor, that then it was his duty to get off from the train in obedience to the request of said conductor, and if the jury believe from the evidence that he remained upon the same despite the request made upon him either to pay his fare or get off from the train, whereupon he was expelled from the same by the conductor, acting in good faith and without malice or wantonness, and that he, the plaintiff, was injured in consequence of resistance made by him when he was being ejected from the train, and that such injuries were brought about by his voluntary misconduct, and that no more force was used than was reasonably necessary to remove him from the car, then he cannot recover any sum of money on account of any personal injuries he may have received. (Given.)

395 (14.)

If the jury believe from the evidence and the instructions of the court that the defendant in good faith believed that the Wabash Railway Company would carry out and fulfill the statements contained in the said telegram signed by G. H. Daniels and dated December 1, 1880; and if the jury believe from the evidence that the said Wabash Railway Company believed in good faith that the said Baltimore and Ohio Railroad Company would carry out and fulfill the statements and undertakings contained in said telegram signed by L. M. Cole and dated December 2, 1880, then no vindictive and punitive damages can be allowed in this case, unless the jury shall further believe from the evidence that the conductor and brakeman wilfully or maliciously used unnecessary force in expelling plaintiff from the train and that said plaintiff was treated with indignity. (Given.)

(16.)

The jury are instructed that the defendant had the right to send to the Wabash railway the telegram of December 1st, and to make the request therein contained, and if the jury believe from the evidence that the defendant did send said telegram and did receive in answer thereto the other telegram read in evidence dated also December 1st, then the jury are further instructed that the defendant had a right to believe that the Wabash would not after said 1st day of December, 1880, issue any tickets of the kind described in said telegram. (Given.)

396 (19.)

The jury are instructed that unless you believe from the evidence that the conductor and brakeman used more force and intended to

use more force than was necessary to expel the plaintiff from the train, then no punitive or exemplary damages can be allowed in this case. (Given.)

Instructions asked by the defendant, but which the court refused to give, as asked, and which the court modified and gave to the jury as modified.

[NOTE.—The instructions last above referred to will be found below in the form in which they and each of them were asked, by *omitting* the words in italics.]

(1.)

The jury are instructed that the conductor, Wilson, had the right to supervise and control his train, and that the demand, on his part, for a cash fare instead of the ticket offered to him, [if the jury believe, from the evidence, there was such demand], should *either* have been obeyed by the plaintiff, or the plaintiff, *when so ordered by the conductor*, should, in a peaceable manner, have left the train. And *for* all such [damages] *personal injuries, if any,* as the jury shall believe, from the evidence, were caused [not by any excessive force on the part of the conductor or brakeman, but] by reason of a refusal on the part of the plaintiff to obey such demand, [if the jury believe, from the evidence, there was such refusal, cannot be recovered in this case], *and were not occasioned by the use of excessive or unreasonable force on the part of the conductor or brakeman, if any was used, no recovery can be had in this case.* (Given.)

397 (3.)

The jury are instructed that in determining the question whether the conductor treated the plaintiff in an indignant or contemptuous manner, they have the right to take into consideration [the manner in which the plaintiff treated the conductor, as shown by the evidence], *all the evidence in the case, including the manner in which the evidence shows the plaintiff treated the conductor.* (Given.)

(4.)

The jury are instructed that while the law, as it stands, at present permits the party himself to testify as a witness in his own behalf, nevertheless the jury, in determining how much credit or weight should be given to his testimony, have a right to take into consideration the fact that he is the plaintiff and pecuniarily interested in the result of the suit. *The jury are the sole judges of the credibility of each and all the witnesses, and they should give their testimony such weight as they think it is fairly entitled to.* (Given.)

(5.)

The jury are instructed that in considering the issues presented in this case, or in considering any fact necessary for the determination of the issues, it would be improper for them to be controlled or

influenced in the slightest degree by any sympathy for the plaintiff, because he is an individual, or prejudiced against the defendant, because it is a corporation; [that the issues should be considered and determined precisely as if both plaintiff and defendant were individuals, or both plaintiff and defendant corporations.]

Nor should they allow the consideration to enter into their
398 deliberations whether the plaintiff needs the money which he seeks to recover, or the defendant's ability to pay; and the personal or corporate nature and circumstances of the plaintiff and defendant must be entirely left out of their consideration in the determination of the issues and the finding of their verdict in this case, and *they should* be guided solely by the law given to them by the court and the evidence admitted with its sanction. (Given.)

(7.)

The court instructs the jury that if they believe from all the evidence in the case that the plaintiff, at the time that he was evicted from the train, was not personally injured, and that since that said time he has sustained no *personal* injuries resulting from said eviction, then the jury should render him no compensation on account of the personal injuries complained of in this case; [and in determining the question as to whether or not he was in fact injured, they have the right to take into consideration the fact, if they believe from the evidence that it is a fact, that he has testified differently on this trial from what he did on a previous trial or trials, in regard to said injuries and the manner in which he was injured, together with all the other facts and circumstances in evidence in the case.] (Given.)

(8.)

The court instructs the jury, that if they believe, from the evidence in this case, that the conductor, Wilson, at the time and place mentioned in the evidence, requested plaintiff for his tickets, and that the plaintiff exhibited the ticket introduced in evidence,

and that said conductor refused to accept said ticket and de-
399 manded a money fare, and that the plaintiff refused to pay the same, and that said conductor requested him to leave the train, and that said plaintiff refused so to do, and that thereupon said conductor, aided by an employé of the defendant, expelled the plaintiff from the train, and that in so doing used no more force than was *reasonably* necessary for the accomplishment of that object, that then the plaintiff cannot recover anything on account of any personal injury received by the use of necessary force. (Given.)

(10.)

The jury are instructed, that the evidence relating to sending of defendant's said telegram to Daniels, the defendant's issuance of the circular letter, the issuance of the ticket in question, the giving of the instruction in question to Conductor Wilson, or Wilson's refusal to accept the ticket *should not* [does not indicate bad faith or malice,

and cannot, therefore], be made the basis of any exemplary or punitive damages in this case. (Given.)

(24.)

The jury are instructed that the circular letter of the defendant put in evidence, *should not be construed* [cannot be held or considered] an assent on the part of the defendant to the issuance of tickets of the kind in question after its date and up to the tenth of December, 1880. (Given.)

(25.)

The court instructs the jury, that if at the time when the evidence has all been submitted and the arguments of counsel have been made, they, or any one of them entertain views of the
400 law which are in conflict with the views expressed by the court *in these instructions*, then it is their duty, under their oaths, to abandon their own views of the law and be guided by the law as expressed by the instructions of the court. (Given.)

(26.)

The court instructs the jury that if they believe from the evidence that the plaintiff *or any other witness* has willfully sworn falsely [respecting the condition of his health, or has willfully sworn falsely respecting the extent, nature or duration of the injuries claimed by him to have sustained], *as to any material facts in the case*, then the jury have the right to reject his entire testimony except in so far as they find it to be *corroborated by other* witnesses whose testimony they believe, or other credible evidence in the case. (Given.)

But the court refused to give said last-named instructions or either of them as asked, but altered and modified said instructions and each of them, and gave them and each of them as follows:

[NOTE.—The instructions in their modified form appear on record pages 504 to 512, inclusive. Said instructions as modified may also be seen in the last foregoing instructions by *including* the words in italics and excluding the words in brackets.]

Exception by defendant to refusal of the court to give said last-mentioned instructions and each of them as asked, and modifying said instructions, and each of them and giving them and each of them as modified.

Instructions Asked by the Defendant and Refused by the Court.

401 (2.)

If the jury believe from the evidence that plaintiff suffered damage by reason of the physical injuries, and that such injuries were caused by forcible resistance to the request of the conductor to either pay such fare or deliver such a ticket as the defendant's instructions to said conductor required, or to leave the train when at a stop at a regular station, then as to such damage there can be no recovery. (Refused.)

(12.)

If the jury believe from the evidence that the conductor's demand for fare was made in good faith, and that the plaintiff had money with which he could immediately have satisfied such demand, and if the jury further believe from the evidence that the plaintiff knew or had reason to believe that a failure thus to satisfy said demand would result in a delay in his journey, and a consequent damage to his business, then it was his duty thus to satisfy said demand. And if the jury further believe from the evidence that he neglected or refused to perform such duty, then he cannot recover for such resulting damage. (Refused.)

(13.)

The court instructs the jury that if they believe from the evidence in this case that the injury complained of could have been avoided by the plaintiff obeying the reasonable request made by the conductor of the defendant, then they should refuse to allow the plaintiff anything on account of such injuries. (Refused.)

402 (15.)

The jury are instructed that there is no evidence that the defendant owned or controlled the junction road so called, and the proof that plaintiff's ticket was accepted on said junction road is no evidence of plaintiff's right to ride on said ticket from West Philadelphia to Jersey City. (Refused.)

(17.)

The jury are instructed that the plaintiff cannot recover any damages, which the jury shall believe from the evidence resulted to him or to his business by reason alone of forcible resistance on his part to the demands of the conductor for payment of fare or to any forcible resistance on his part to the demand of the conductor to leave the train whilst at a standstill at a regular station. (Refused.)

(18.)

If the jury believe from the evidence that the Baltimore and Ohio Railroad Company, by L. M. Cole, sent to the Wabash Railroad Company the said telegram, dated December 2, 1880, and that the said Wabash Company, by said G. H. Daniels, received said telegram, that the said Wabash Railroad Company had the right to believe that the said Baltimore and Ohio Railroad Company would carry out and fulfill all that it states and undertook in said telegram to do; unless the jury shall further believe from the evidence that said Wabash Railroad Company had reason to believe that said Baltimore and Ohio did not intend to carry out and fulfill all that it stated and undertook in said telegram to do. (Refused.)

403 (20.)

The jury are instructed that unless you find from the evidence that the defendant had reason to believe that the Wabash Railroad Company intended to issue tickets of the kind in question after the said 1st day of December, 1880, then the defendant had a right to instruct its conductors not to receive tickets of the kind in question issued by the Wabash after the 1st day of December, 1880. (Refused.)

(21.)

The jury are instructed that, in considering the evidence with reference to the alleged injuries of the plaintiff, it is proper for the jury in estimating the weight or value of the opinions and treatment given by the doctors, bearing in mind how much is shown by the evidence that such opinions and treatment were based upon the statements of the plaintiff, and how much upon the symptoms and conditions apparent to their own senses. And the jury are instructed that if, in view of all the evidence in the case, they disbelieve the statements of such plaintiff, then they may ignore the opinion and treatment of the doctors, in so far as such opinions and treatment are based upon his mere statements. (Refused.)

(22.)

If the jury believe from the evidence that the plaintiff, in a loud and angry or excited tone, said to the conductor that he, the plaintiff, did not intend that he, the conductor, should steal the plaintiff's money, or that the plaintiff used words to that effect, then the jury should consider from all the facts and circumstances in evidence whether such language did or not rightly tend to create in
404 the mind of the conductor a feeling of contempt for the plaintiff. If the jury should believe from the evidence that the plaintiff used such language with such effect that the conductor thereafter treated the plaintiff with contempt, then the conductor was justified with so doing. (Refused.)

(23.)

The court instructs the jury that if they believe from the evidence that the plaintiff at the time and place mentioned in the evidence, was a passenger upon a train of cars of the defendant, and that the conductor of said train requested the plaintiff for his ticket, and that said plaintiff produced a ticket which said conductor declined to accept, and demanded the usual and ordinary fare instead of the same, and that the plaintiff declined to pay said fare, and that said conductor thereupon requested the plaintiff to leave the train at a regular station on said road, that then, under the law, it was the duty of said plaintiff to have left said train, leaving him to his right to sue the defendant for a breach of the contract. (Refused.)

Exception by defendant to the refusal of the court to give said last-named instructions and each of them.

Instruction given by the court of its own motion.

Court's Instruction.

(27.)

The jury are instructed that in considering this case they will entirely disregard any and all statements by counsel as to what the supreme court has or has not already decided in this case. They will consider the evidence as given on this trial, and from that evidence and under the instructions of the court determine the issues. (Given.)

405 Exception by defendant to the giving of said last-named instruction.

The foregoing shows all instructions that were given.

Verdict for $7,000 rendered February 26, 1887.

Motion new trial by defendant based on following several grounds:

1. Admission of improper evidence.
2. Exclusion of proper evidence.
3. Giving improper instructions for plaintiff.
4. Refusing proper instructions asked by defendant.
5. Refusing proper instructions as asked by defendant.
6. Erroneously modifying instructions and giving them on behalf of defendant as modified.
7. Use of unjust and improper language by counsel for the plaintiff in the presence and hearing of the jury before the jury retired to consider of their verdict.
8. That pending an adjournment of court, and in the absence of counsel for the defendant and without notice to counsel for the defendant, the honorable, the judge of said court, called the jury before him and erroneously conversed with and instructed the jury in said cause.
9. Verdict contrary to the law.
10. Verdict contrary to the evidence.
11. Amount of verdict excessive.

Affidavits in Support of Motion.

Upon hearing of said motion the defendant, upon due notice thereof to the plaintiff, produced the following affidavits and
406 each of them, and asked leave to file the same and each of them in said cause, but the said court upon the reading of them and upon consideration thereof, refused to permit said affidavits or either of them to be filed in said cause.

Exception by defendant to the ruling last aforesaid.

The affidavits last above referred to are as follows:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County.

WILLIAM J. CONNELL }
vs
PENNSYLVANIA RAILROAD COMPANY. }

Joseph C. Finch, being duly sworn, says that he is a stenographer and short-hand writer, in regular practice and capable of reporting all proceedings in court, and that on the 25th of February, 1887, he did report the address of Judge Sidney Smith, to the jury in the above-entitled cause, and that said address of said Sidney Smith is truly and correctly contained in the annexed transcript, and that said transcript is a true transcription from my short-hand notes, taken on said trial.

JOSEPH C. FINCH.

Subscribed and sworn to before me this 5th day of March, 1887.

JOHN GRAY,
[SEAL.] *Notary Public.*

407 STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, February Term, A. D. 1887.

CONNELL }
vs.
THE PENNSYLVANIA RAILROAD COMPANY. }

Address of Judge Sidney Smith to the Jury at 10 a. m., February 25, 1887.

If the court please, and gentleman of the jury: I will endeavor to be as brief as possible in what considerations I present to you in this case. I know it is a common thing for counsel to say that a case is a very important case, whether it is really so or not. My experience at the bar as an attorney leads me to think that it is a stereotyped phrase used somewhat indiscriminately, but I feel warranted in saying, gentlemen, that this is an important case, not merely because of the amount involved in dollars and cents, but on account of the public interest which surrounds this case, that is, its bearing upon public interests, the traveling public.

Now, this case has resolved itself into what we lawyers call an assessment of damages. There is no dispute, and can be no dispute, that we are entitled to recover a verdict with an assessment of damages, no doubt about that. Now, we have a good many States in this Union; and each State has a supreme court, and the decisions of the supreme court of each State are final as to the law in that State. No lawyer has any right to controvert the law as expounded by the supreme court of his State, no matter what his

private notions may be. Now, upon one question—it is
408 merely a question relating to the item of damages—the supreme court of this State has laid down a rule not in harmony with the rules in other States, but that is nothing to us. It is sufficient to say that it is our supreme court. Now, what is that rule? It is a rule that relates only to the item of damages here in this case, which relates to the injury, if any, which Connell received in being bounced from that car by the conductor and brakeman, and what is it? Now, a man buys a ticket which entitles him to a seat from here to New York, or from here to Philadelphia, or from Philadelphia to New York. He buys a seat, he pays his money, he gets aboard the cars and takes his seat. Now, he has the same right to occupy that car and to ride the distance that the ticket indicates, that he has to occupy his own house and home, whether it be a wretched house, or whatever kind of house it may be, because when a man rents a house he buys the house for the period of a lease, that is, he buys the use of it. Now, all agree to that. Our supreme court says that is so. Now, in this case Connell bought a coupon ticket from Philadelphia to New York. The ticket is in evidence here. I will not stop to read it to you. He bought it of the agents of the Pennsylvania Company. So the supreme court have settled in this case the law. It was one of the coupons in a ticket that took him from Omaha, where he resides, 500 miles west of here, to New York city. He got to Philadelphia, and the other coupon had been taken up, leaving this last coupon for the last section of the journey, so to speak. Very well, in going from Baltimore to Philadelphia—this was in December—it had rained and frozen onto the platform of the car, on the step, and anybody acquainted with the climate,
409 who has seen anything of the climate between Baltimore and Philadelphia, is aware that during the winter time, when we have snow and the thermometer ten below, the normal condition of the weather there is rain and sleet. It is probably the meanest climate on earth. Now, Mr. Connell arrived in Philadelphia; he did not change cars, I believe, I know he did not, until he got over onto the transfer track. He started for New York on business. He had business in New York and had business in Connecticut, Hartford, I believe, or New Haven, I don't remember which. He presented his ticket, which had been bought of the agent of the Pennsylvania Company, and it was refused, wrongfully refused, mind you. Don't forget that. The only thing the supreme court of this State has said, is that where a conductor has received orders from his principal, from the high muck-a-mucks of a railroad, to not receive such a ticket, and he don't know the facts himself, that he is excused for obeying orders. He is not sued here. Wilson is not sued here, but the point of this case is that the railroad company, represented by its high officials, permitted a wrong and outrage in directing the conductor not to receive it. That is the point. Now, don't forget that. Now, what has the supreme court of this State said? They say that wherever a conductor is situated as Wilson was here in relation to that order, that he is excusable in obeying the order, not that his act is legal as against the company

itself, but he is excusable. Now, what else do they say? They say that to avoid a fight, to avoid a scrimmage, to avoid a breach of the peace, in the interests of quiet on a car, that the passenger should not make a fight, but should go out when ordered, then bring his suit against the high muck-a-mucks, as the boys say. That is what they say, and it is all they say. But, at the same time, they say you can bring your suit; you can recover damages for
410 the value of the ticket; you can recover damages for the delay and inconvenience; you can recover damages for the indignity put upon you by ordering you off the cars. So that in relation to those three items, gentlemen, there is no dispute at all in this case. In any view of the evidence, we are entitled to damages to be assessed on the basis of those three items. Now, gentlemen, to a plain man, the rule of law in this State that requires him to walk out when he has a right to stay, to prevent a fight, seems very strange. For instance, you are in the occupation of your house, we will say for the sake of the argument that you have rented the house of some man who owns it. A constable comes along armed with a power of attorney to put you out, no right to outrage, outrage on the part of the owner of the house, but the constable receives the order and comes to you and says, Get out of here. Now, to a plain man it would seem as if he had a right to say, No sir, I have a right here and propose to stay. Now, if the constable does not commence a fight with you there will not be any fight, will there? It seems to me, and it would seem to most any plain man, singular that the learned judges who established this rule forgot to say that it was the business of the conductor not to collar a man and throw him out in the interests of peace and quiet; that he should not commence a fight, but should let a passenger ride and let the railroad sue him for fare if the passenger is wrong and the conductor right. It would seem so, but that is not the law. The law is that the conductor has the right to commence the fight, not the right, but that he is excusable for commencing the fight, leaving the unprotected passenger to step out of the car and go to the courts of justice for his redress. Perhaps no case, gentlemen, could be cited that would better illustrate the nature of that de-
411 lectable privilege of commencing a suit in a court of justice against a railroad company. A man commences a suit against the railroad company and they employ distinguished and adroit lawyers, as they have done in this case, and by dint of ingenuity and perseverance they keep the case in court more than a dog's age, which is said to be seven years, staving off a decision on the merits by the enforcement of legal technicalities. I am not saying that because men have not the right to invoke technicalities, but I am saying it to illustrate the character of the remedy to which the courts of this State have turned the community over; but, nevertheless, such is the rule in this State, such is the rule we propose to work by in this case. No doubt about that. Now, at the same time, if a passenger refuses to sneak out, without leaving to the conductor the responsibility of putting him out, it behooves the conductor and the railroad company to see to it that they do not

use any unnecessary harshness, that they do not unnecessarily treat the party roughly in throwing him out, because if they do, then not only are we entitled to damages for the value of the ticket, the inconvenience and indignity, but if they use a party unnecessarily roughly then he is entitled to add to the other items damages for the personal injury. That is this case, which, gentlemen, I think you will all come to conclude upon the evidence. Now, gentlemen, before briefly calling your attention to the circumstances surrounding this case, I feel warranted in making this general assertion, that this case is a bold instance of the arrogance and oppression, the spirit of arrogance and oppression that surrounds these mammoth corporations east. Vanderbilt, in his lifetime, best expressed the true animus of these institutions, when some newspaper reporter interviewed him in relation to some
412 question of public necessity. Speaking of public opinion, etc., what reply did he make? "Public opinion be damned." Here are two mammoth corporations; one is the Baltimore and Ohio, headed by Garrett, and the other is the Pennsylvania Company, which permeates the State of Pennsylvania. They got into a quarrel. These giants in the financial world got into a quarrel. What did the management of the Pennsylvania Company say to their conductors? After such a date, bounce any man who undertakes to ride on a ticket that our agents have sold, provided that, in coming through from Omaha to Pennsylvania, they have had the hardihood to ride over the Baltimore and Ohio road. That is the ground of the position, that is the ground on which the conductor based his refusal to take the ticket. There is a quarrel. A western man buys a ticket to New York of an agent of the Pennsylvania Company. He starts to New York. He gets to Philadelphia, and he has been guilty, innocently, but he has been guilty in the eyes of the Pennsylvania Company, of the unpardonable offense of riding over the Baltimore and Ohio road, and when he undertakes to ride over the Pennsylvania road, the conductor says he has received orders to bounce him if he don't pay the fare again; well, why? Well, there is a quarrel between the Baltimore and Ohio and the Pennsylvania Company, and the Pennsylvania Company will not allow any man to ride on their road, although he has bought a ticket over their road, if before he comes to their road he has ridden over the Baltimore and Ohio. Now, that is this case. Talk about arrogance! Talk about wanton disregard of the rights of the public! Why, the public be damned, says Vanderbilt, and he was the king bee among king bees in those mammoth corporations
413 east. Well, what occurred? At the same time that Mr. Connell handed the ticket to the conductor he handed him the only money he had in his pocket, a five-dollar bill, and requested him to change that bill as he wanted to buy some newspapers. He did not dream that the conductor was going back on the ticket, he handed him out the ticket, and the five-dollar bill, and said to the conductor, "Will you please change a five-dollar bill, as I desire to buy some newspapers?" The conductor takes the money. Why, said Connell? Well, the conductor says, there is a quarrel between

the Baltimore and Ohio and this company, and this company won't allow any man to ride over our road if they have ridden over the Baltimore and Ohio first, that is one reason. Well, the conductor says, I have got orders from the high muck-a-mucks, I don't know anything about this quarrel, the merits of it, I have got to obey orders or they will bounce me. That is the way Wilson talked, that was his position. Well, when Wilson had refused the ticket, and insisted upon the fare, he commenced rolling this bill up and putting it in his pocket. Well, Connell thinks, that is adding insult to injury. He has offered a valid ticket, and had handed the conductor a bill to change, not to pay fare, and the conductor commenced as though he was going to use it, and take three dollars and some cents fare out; and Connell, as you or I would have done, said, "I will not allow you to steal the money if you won't allow me to ride." Of course that made Wilson mad; undoubtedly. Wilson handed back the bill. He knew he had got to. Now, I don't say that Wilson really intended to appropriate that bill. He certainly did not, if we are to believe his testimony, but apparently he was going to appropriate the bill for fare. Connell had a right to presume so because he was the very man who had refused the valid ticket. Therefore, Connell did as he did, did just as I would have done, and as any of you gentlemen would have done. He knew it was all the money he had. He had a draft which he could not use, as you will recollect. Well, that incensed the conductor. The conductor is not the best man in the world. He is a great deal superior man than the brakeman, no doubt about that, now he says, I will bounce you out of here if you don't get off, he rang the bell, the train stopped at Tacony, and he did bounce him out. You have heard the testimony, gentlemen, about the bouncer of the bouncee. Now, let me say that the conductor seized Connell either by both hands, or by one hand and shoulder, it is not material which, except that Connell says that it was by one hand and shoulder—I am inclined to think he knows best, because it was his shoulder and his hand, and he knew better where he was seized than anybody else that was looking on—and pushed him towards the door. Connell did not immediately go out. Connell had not read that portion of the scripture which says that if a man smite you on one cheek turn the other, if the conductor smites you on one cheek, turn the other. There are but few of us who live up to that, gentlemen. I suppose we ought to. But Connell says, "I won't sneak out here like a culprit. If you take the responsibility of putting me out, put me out." Well, he took hold of him and moved him towards the door and handled him pretty lively, because in doing it he had jerked the ticket, or got the ticket out of Connell's hands, the very thing you know which gave him his ride, and it dropped down, and substantially the only struggle which Connell made in the car was an effort to get the ticket, he didn't have the ticket, it was knocked out of his hands and he was not going to let him get it, but he got it, and in getting it, to some extent, gentlemen, he made a struggle there. He had a right to. He had a

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right to struggle for the purpose of retaining his property, the ticket which he had purchased. No doubt about that. No court would decide that he had not the right to reclaim his own property. Well, he got to the door. He was not hurt up to the time he got to the door. In putting him through the door lively he hit his elbow. That was unnecessary, unnecessary rough handling. They handled him very roughly in trying to prevent him from getting his ticket, but, he was not injured so that if it had stopped there he would have been laid up from the personal injury or suffered much pain. They got him out onto the icy platform. The conductor was hauling him down the steps, and to save himself from falling he seized the rail with one hand. This delectable brakeman, discovering that he had seized the rail, jerked his hand off, and he fell, striking his hip here (indicating) on some part of the hard substance, either the rail or the timber, or something else, striking his hip. There is where the injury was done. Now, I undertake to say that the conduct of this brakeman in jerking his hand off of there was simply wanton and reckless. It was totally uncalled for. Connell says himself that after he got to the door he made no sort of resistance, and they do not pretend he did. Neither the conductor nor brakeman say that he offered any resistance after they got him out of the door; and yet, gentlemen, being pulled down these steps, slippery with sleet and ice, putting his hand on the rail and taking hold of it to save himself, this burly brakeman grabbed his hand, jerked him off, and down they go. Is not that so? Is there any doubt about it? Don't he know whether he struck—don't he know whether he was
416 hurt? The conductor says, and that is all he pretends to say, that he didn't see him strike. Very likely he did not. The conductor, gentlemen, is a far superior man to this burly-headed brakeman. No doubt about that. All the conductor would say was that he did not see him fall. They call on this brakeman. The conductor said he would not say whether there was ice on the steps or not. What does this brakeman say? They call him back, you know. He will swear to everything. They always do in railroad cases. When the brakeman goes on the stand, Mr.—I can't pronounce his name, I won't try to pronounce it—I will call it Mr. brakeman. Mr. brakeman, was there any ice on these steps or platform? No, sir. Mr. brakeman, did Connell fall striking his hip? No, sir. That is the kind of man he is. Why, gentlemen, that man would swear the ears off of cast-iron dogs in the interest of the company he works for. He is not the only man I have seen of the same type. You see him in courts of justice every day, if you are in courts of justice, whether at the bar or on the bench. Perhaps unfortunately for me, I have been in both places. I recollect one time when I was assisting Judge Blodgett, then the attorney for the North-western road, in defending a case where the evidence was overwhelming that the party brought the injury on himself by reckless carelessness, and the witnesses came on and testified fairly and truly, three or four of them. Says I, Blodgett, I am nervous. Says he, what are you nervous about? Says I, I am afraid that the next

employé called will deem it his duty in the interests of the company to swear to a lie. Well, says he, you need not be alarmed; I am too experienced a man to permit any such thing; if I think a man will lie I won't call him. Now, this brakeman comes; that
417 is the way it is made up. He is a chuckle-headed ruffianly-made man. He thinks to secure permanency in his position that he must walk right up and say yes or no; no dodging. That is what he thinks. Now, he is mistaken. Now, gentlemen, wasn't there ice on that platform; the man had ridden right there. Mr. Connell says that there was ice there; he knew of the ice when he went into the cars, he said. Is there any doubt — that? The conductor says: Gentlemen, I do not know whether it was icy or not; but the brakeman says—Mr. brakeman, any ice? No. Mr. brakeman, when you jerked the man's hand off the railing, did he fall and strike his hip? No. He had done his duty, hadn't he? Gracious, he will go back with flying colors he thinks. Now, then, gentlemen, I say therefore, that by reason of the brutal treatment of this brakeman Connell was seriously injured. It is lucky that he was not hurt worse than he was. Have you any doubt but that he was injured? What does he say? He says he went to New York and felt very bad, felt dazed, went to New York and went to the hotel. He got in there and probably told them honestly and squarely that he had been bounced from the train, that he had five dollars and that it was used all up in getting a ticket to Philadelphia after having a ticket to take him there. The clerk looked at him, he says, I have got a draft on New York which I got in Omaha, and I would like to have it cashed. The clerk says, it is contrary to our custom. Why, gentlemen, that clerk looked upon Connell with suspicion; a man coming into the hotel and saying, I have been bounced from the train of the Pennsylvania Company, I have had to pay fare twice and am short of change, but have got a draft on New York. The clerk hadn't time to look into it to
418 see whether it was bogus or not, but the natural inference would be that a man bounced from a train was a man that would present a bogus draft. What did he do? Well, he says he finally arranged with them to pawn his watch. A nice position for a man to be put in who has paid his fare and who is entitled to a ride. Now, the supreme court says, that irrespective of the excess of force, Connell is entitled to reasonable damages for the indignity placed upon him by being thrown off. That is what they say in so many words, and so the court will instruct you. Now, gentlemen, you know just how it is yourselves; you are riding on a train, on one of the trunk lines east or west; you are sitting in the car and the conductor comes along and has a dispute with some man on the car, and by and by he bounces him off. I wonder what that man is; is that a bunco steerer, is that a policy man, is that a traveling thief, or what is the matter with that man? You go out on the platform when the train stops and the man comes up to you and tells you so and so, I am Connell, Omaha, practicing lawyer, I have paid my fare and have not got money enough to take me to New York, will you lend me five dollars, I will give you my address and will take yours,

and I will send it to you the moment I get back. You look at him. You look all right, so does a three-card-monte man look all right. You look all right, so does a bunco steerer look all right, but you seem to have been bounced here and I don't think I will lend you five dollars. That is the effect of this thing. That is what the supreme court calls indignity put upon a man by bouncing him from a train. Now, it is for you to say, irrespective of the question of whether there is more force used, whether he is injured, it is for you to say what, in the interests of the public, you will do with a
419 railroad which will treat a man without rhyme or reason as they treated Connell. I assume that you are all fair men here, and mean to do the fair thing between these parties, and the fair thing in the interests of the public. I assume it. I have a right to assume it, and there is no reason why I should not assume it. Now, gentlemen, it is the Pennsylvania Company that we are after here. It is the Pennsylvania Company that we have sued, not some subaltern, not some conductor or even this chuckle-headed brakeman. Now, this Pennsylvania Company had agents at Omaha in the general ticket office there, to sell tickets over their road. So the supreme court have decided in this case, and so we all know it has decided. The agency at Omaha, in good faith, and with authority, had sold this coupon ticket on the 7th, not having received an intimation even of the quarrel between the mammoth corporation, the Baltimore and Ohio and the Pennsylvania Companies, they didn't know anything about it, didn't care anything about it, they sold the ticket, took the money, put it in their safe or vault, took Connell's money for this coupon ticket. Now, they being agents with authority to sell this coupon ticket for the Pennsylvania Company, not this alone, but day in and day out, selling them by the hundreds, you might say. Every month they render an account to the Pennsylvania Company, that is to say, here is the Omaha office agent of the Pennsylvania Company to sell coupon tickets, he takes the money in at Omaha, at the end of the month they make a statement of the amount of money which they have taken which belongs to the Pennsylvania Company, mind you, like good and faithful servants, which my friend has a right to, I have no doubt, they render an account of their stewardship, including the $2.52 that the Pennsylvania Railroad Company
420 was entitled to for this very ticket which Connell had bought, which Connell had paid for, and which Connell had a right to ride on. They bounced Connell at Tacony station on the 16th day of December, and in January or February after—what is the date of that report? The 1st of February, the 10th of February, they received a report from the Omaha agency that the agency had got $2.52 of Connell's money which they had received for this very coupon. The Pennsylvania Company draws a draft on the Omaha agency and takes the $2.52. They bounce Connell, and then take the very money which he paid for a ticket and put it into their pockets, and have got it now. What do you think of such kind of talk as that, gentlemen? Now, what do you think of it? I ask you as fair men, what do you think of it? If a worse outrage than that can

be put upon an unoffending citizen, I would like to have ingenuity describe it. I cannot. Here they are litigating and litigating, trying to ward off the just responsibility for their outrageous conduct, aren't they? Gentlemen, Mr. Connell says that he got to the hotel and that he had repeated evacuations, had to go to the closet frequently, and that blood passed, bloody discharges. Did he make that up? Has he lied to you? Have you any right to say that he committed deliberate perjury in making that statement? Don't he know that he had bloody discharges? He got home to Omaha, and a bright, promising young physician, who, as I understand from the cross-examination of my friend Trude, has since fallen to a certain extent a victim to strong drink, which has ruined more brilliant men than any other cause, Dr. Chadwick says, that he had bloody and dysenteric discharges, that is, bloody matter and pus,
but he says it couldn't have been dysentery, that it was not
421 the season for dysentery, and must have been caused by this
injury. He had the discharges. You do not doubt it. Nobody doubts it. Trude does not doubt it. I do not think that Mr. Willard doubts it—I could not say as to that. I could not guarantee you about that. Very well, the acute phases of the disease soon passed out. An energetic man, a man that don't lay around when he is not sick; he kept on struggling to keep up. By and by he discovered that his right leg was withered. He did not examine the leg. He is not a hypochondriac; he didn't know anything about the tendency to a withered leg from such an injury as this; he is not a physician or surgeon; he did not examine his leg; he did not discover that it was withered until a long time after. When it commenced to wither nobody knows, because he was not watching the leg. Now his right leg, he says, was as large as his left, and some larger. Is that strange? Now, gentlemen, don't Mr. Connell know more about his legs than Dr. Isham did of Connell's legs, not Isham's; and if Isham was called upon to state as to his own legs, it would be ridiculous to call Connell to ask his opinion about Isham's legs. But, gentlemen, the physician and surgeon whom Connell consulted says that he took an accurate measure and found that the leg was from an inch to an inch and a half smaller than the left. Two railroad surgeons go on the stand, and they both admit that it is smaller. Of course, they have to make it a little less small than did the surgeon whom the plaintiff called, but they both admit that it is smaller. Then they plied him with questions: Doctor, in your opinion, was the shrinkage of this leg to be attributed to the bouncing this man got on the 16th of December? My opinion is that it was not. Then the
other surgeon went to measuring legs up here in Cook County
422 hospital. Why, gentlemen, I should think, from what I have
heard, that there has been a good deal of leg-measuring up that way, not only in the hospital, but in certain cribs outside. He brings up an old bum who is consigned to the tender mercies of the county hospital, he brings up an old bum, who comes limping up (illustrating) and measures his leg; why, says he, here is an inch difference in the leg of this old bum, and so he goes on. Now,

gentlemen, human nature is human nature. You cannot make an angel of a man. Sometimes they call women angels, but they never call men angels. You recollect that Trude says that you must treat this case as though the Pennsylvania Company was Mary Smith. Now, he thought of course that you would immediately associate the idea of an angel with a woman, and he wanted you to treat this company as a female corporation. Well, perhaps it is, I don't know. I don't know what the gender is, but of all the angels, gentlemen, on earth, you will find some of these female angels the worst. Well, Dr. Lee, take the stand; Dr. Isham, take the stand. Now, we all know these gentlemen. We are not here to say that they are anything else than good, respectable physicians. Neither are they any better, are they? Now, they are sent around by the railroad companies, and did you ever know one of them to find what the railroad did not want them to find, did you ever? I never did. Dr. Isham says: Well, sir, my knowledge of this case is somewhat of a negative character. I should say it was. He gives his opinion. Dr. Lee does likewise. Now, these railroad surgeons, some of them work on a yearly salary, and some of them work by the piece. Some of them come into our courts and swear by the year upon a fixed salary, others come in and swear by the job. That is a fact, gentle-
423 men, that is a fact. Now, then, without intending to do wrong, without intending to be unfair, without intending to color their testimony or their opinions, it is but human nature that these men should not be very anxious or likely to find what their employer does not desire that they should find. Is not that so? Am I not right about that? Now, then, gentlemen, I have already occupied more time than I intended to. Mr. Hynes will follow me, or close this case for the plaintiff, and without going over any more ground and alluding to some things which I should allude to if there were no one to follow me on the same side, I will leave this case in your hands. And, gentlemen, all we ask is a fair deal. We ask you, gentlemen, to render a just verdict here. We ask you, gentlemen, to render a verdict for large damages. Why? Because the case in all its surrounding circumstances is an outrage, and in the interests of fair play, and for the purpose of keeping these gigantic corporations in their places, where they belong, when you discover them riding rough-shod over the rights of individuals who are riding on their cars, teach them a lesson. Isn't that right? I don't want you to exercise any prejudice. You haven't any against the railroad system, not at all? The railroad system is valuable. It is one of the improvements in the interest of progress; but, when these concerns get so large, so defiant as to become arrogant, and to disregard the proper interests and just rights of the public that travel over them, say to them, gentlemen, we will teach you a wholesome lesson. Isn't that right? No wonder, gentlemen, that as a counter-irritant, to use the expression of the doctors, that we see anarchy creeping out. It is but the counter-irritant. Trude will understand that because he is an expert in medical terms. It is but a counter-irritant to the tendencies of these gigantic combi-
424 nations of capital who manifest a spirit of insolence and

arrogance while serving the public, while becoming enriched by the patronage of the public. One of these autocrats is interviewed by a newspaper press reporter, who says, What do you think about public opinion on this question? "The public be damned." That is the spirit of the whole business. Now, gentleman, we want to teach them a lesson. It is right that we should teach them a lesson. It is in the interest of fairness that we should teach them a lesson, the interests of the public that we should teach them a lesson, and I say to you, gentlemen, today that if you fail to teach this mammoth corporation a lesson in this case you will mistake your honest duty.

STATE OF ILLINOIS, }
Cook County, } *ss.*:

In the Superior Court of Cook County.

WILLIAM J. CONNELL }
vs.
THE PENNSYLVANIA RAILROAD CO. }

David Callahan, being first duly sworn, on oath says that he is a law student, and that he resides in said county and State.

Affiant says that the jury in the above-entitled case retired to consider their verdict about half past 4 p. m. on the 25th day of February, A. D. 1887; that they remained out all the rest of the afternoon and all night.

Affiant further says that about 11.30 a. m. of the 26th day of February, he happened to be in the court-room of the Hon-
425 orable Kirk Hawes; that the said jury were brought before said judge, and were asked by him as to whether or not they had agreed upon their verdict, when one of the jurors spoke up and said that they had not, and that it was not possible for the jury to agree, and that it would be useless to keep them out any longer; that the room in which they were confined was cold and cheerless, and that they had no light except that afforded by a candle or candles; whereupon the court then and there stated in substance and effect that the case had been tried before and had cost the county considerable; that the jury ought to agree upon a verdict.

Affiant further says that the court resumed as follows: "You complain of no light being furnished; I will see the county commissioners and have lots of light for you next week." Thereupon one of the jurors stated that there was no likelihood of the jury agreeing; that one of their number was considerably set in his views, or would not agree, or something to that effect; that the court then stated that it was important that they should agree upon a verdict; that the very nature of a jury implies concession and compromise; that no one juror should control the result, or otherwise the verdict would be the verdict of one man, and not of twelve; that our whole lives were made up of compromises; that those who were high in amount should come down, and that those who were low in amount should go up, or something to that effect; that the

case had been frequently tried, and had consumed a great deal of time.

Affiant further says, that one of the jurors said that it was pretty hard; that there was no use; that the court then and there said in substance: "We must try and get a verdict; you have been out a long time, and you say that there is no chance of your agree-
426 ing; that one man thinks he knows more than the other eleven; you must try and convert him or bring him to some sort of decision; you complain of no light being furnished. I will see the county commissioners and have lots of light for you next week. Life is made up of compromises; there has to be give and take; life itself is a compromise."

Affiant further says, that something was said by the court about a window, but affiant says that he did not catch the remarks of the court with such certainty as would enable him to swear as to what the court did say with regard thereto.

Affiant says that the foregoing language of the court was repeated by him, varying somewhat in form.

Affiant further says, that said judge further stated, in reply to a statement made by a juror, that the room in which they were located was very cold, that he, the court, would see to it that the bailiffs allowed the jury to stay in the large court-room that night, to wit: the night of February 26, 1887; that one of the jurors then stated as follows: "What are we going to do in regard to getting something to eat?" The court then stated the bailiff will attend to that, whereupon said juror remarked: "Suppose we have no money to pay for it?" That thereupon the court remarked as follows: "Oh, I suppose you will get along." That thereupon the jury retired, and in about half an hour agreed upon the verdict rendered in this case.

DAVID CALLAHAN.

Subscribed and sworn to before me this 9th day of March, 1887.

P. H. BISHOP,
Notary Public.

[SEAL.]

427 STATE OF ILLINOIS, }
County of Cook, } *ss:*

In the Superior Court of Cook County.

WILLIAM J. CONNELL }
vs. }
PENNSYLVANIA RAILROAD CO. }

John W. McMillan, being first duly sworn, on oath says:

That the jury in the above-entitled cause retired to consider their verdict about half past 4 p. m., on the 25th day of February, A. D 1887; that they remained out all the rest of the afternoon, and all night, and that until about 11.30 a. m. of the 26th day of February, when the jury were brought before the court, the Honorable Kirk Hawes, and were by him asked as to whether or not they had

agreed upon their verdict, when one of the jurors spoke up and said they had not, and that it was not possible for the jury to agree, and it would be useless to keep them out any longer; that the room in which they were kept was cold and cheerless, and that they had very little light; whereupon the court then and there stated in substance and effect that the case had been tried before, and had cost considerable, and that the jury ought to agree upon a verdict; and the court said: "You complain of no light being furnished; I will see the county commissioners, and have lots of light for you next week." That thereupon one of the jurors spoke up and stated there was no liklihood of the jury agreeing, and that because one of their number was considerably set in his views, or would not agree, or something to that effect; that the court then stated that
428 it was important that they should agree upon a verdict; that the very nature of the jury implied concession and compromise; that no one juror should control the result, or otherwise the verdict would be the verdict of one man, and not of twelve men; that the world was made up of compromises; that those who were high in amount should come down, and those who were low in amount should go up, or something to that effect; that the case had been frequently tried; that the case had consumed a great deal of time, and has been tried three times, involving great expense to all parties; that the court said: "We must try and get a verdict. You have been out a long time, and you say as there is no chance of your agreeing, that one man thinks he knows more than the other eleven, you must try and convert him, or bring him to some sort of decision. I have heard of a refractory man being threatened to be thrown out of a window in such case. You complain of no light being furnished. I will see the county commissioners and have lots of light for you next week. Life is made up of compromises. There has to be give and take. Life itself is a compromise." Affiant says that this language was repeated by the court, varying somewhat in form.

Affiant further says that thereupon the jury retired, and in less than half an hour agreed upon the verdict rendered in this case.

JOHN W. McMILLAN.

Subscribed and sworn before me this 5th day of March, A. D. 1887.

C. F. LOESCH,
Notary Public.

[SEAL.]

429 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

WILLIAM J. CONNELL }
vs.
PENNSYLVANIA RAILROAD CO. }

John W. McMillan, being first duly sworn, on oath says that he is the John W. McMillan who made an affidavit in the above-

entitled cause on the 5th day of March, 1887; and that he was the foreman of said jury empaneled in the said cause on the 21st day of February, 1887, and that the statements to the jury by the court as set forth in the affidavit aforesaid, convinced affiant that the court intended to keep the said jury out until they should come to an agreement, and that in consequence of said statements affiant believed that it was his duty to obey the court and compromise the differences existing between the said jurors, and, so believing, he did assent to the verdict rendered in said cause, although said verdict was contrary to his individual judgment as a juror in the case.

JOHN W. McMILLAN.

Subscribed and sworn to before me this 11th day of March, A. D. 1887.

C. F. LOESCH,
Notary Public.

[SEAL.]

430 STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County.

WILLIAM J. CONNELL }
vs. }
PENNSYLVANIA RAILROAD CO. }

George Willard, being duly sworn, says that he, as attorney for the said defendant assisted in the trial of the above-entitled cause at the February term, 1887, of said court. That he was present when said court opened in the forenoon of Saturday, the 26th day of said February, and was present also when said court was thereafter next adjourned. That the aforesaid opening and adjournment of said court took place between 10 and half past 10 o'clock in the forenoon of said day, and that the said adjournment was until the hour of 2 o'clock in the afternoon of said day.

Affiant further says that he was not thereafter present with the jury and with the honorable judge of said court before the verdict of said jury was returned. Nor did affiant have any notice, and so far as he knows and believes, none of affiant's associate attorneys had any notice that any instructions or statements were to be given to said jury between the time of said adjournment and the bringing in of said verdict.

GEORGE WILLARD.

Subscribed and sworn to before me this 18th day of March, 1887.

[SEAL.]

EDWIN STEWART,
Notary Public.

431 *Written Statement by the Honorable Kirk Hawes, Judge of said Court.*

The jury, having been instructed by the court, retired to consider their verdict about 4.30 p. m. on the 25th of February, 1887, and

remained out the rest of the afternoon, all that night, and until about 11.30 a. m. the next day, when on being informed, by the officer having them in charge, that the jury were in a very excited state of mind, the court ordered them brought into the court-room, and inquired as to the probability of an agreement, and if there were any questions of law upon which they desired further instructions. And thereupon one of the jurors replied that it was not the law that troubled them but the facts.

To this the court replied that with the facts he had nothing to do. They were exclusively for the jury to determine, and the court could render them no assistance in that regard. And thereupon another juryman arose in his place, and in an excited manner demanded to know if it was the law that a juryman had a right to close his mouth and refuse to discuss the evidence with his fellow-jurymen or give any reason why he would not agree with them; that in his opinion it was impossible for the jury to agree, and it was useless to hold them together any longer.

These remarks of the juryman were supplemented by another juror, who stated that the jury-room was uncomfortable to spend the night in, that they had no light save candles; that one of their number was set in his way and would not agree to anything, or give any reason why he would not, and he doubted whether they could ever agree.

432 To these suggestions the court replied in substance that he knew of no law that would open a juror's mouth in the jury-room if he did not choose to speak, but the system of trials by jury contemplated that the jury on retiring to their room would consult together, and while each and every juryman had the undoubted right to stand by his own individual opinion, yet before coming to a final conclusion from which he would not be moved, it was his duty to honestly and fairly consider all the evidence in the case with his fellow-jurymen, hearing the reasons or arguments advanced by the others, giving a reason so far as he is able for his own opinions, etc. In short, if he finds himself standing alone in his views upon any material point he is bound honestly to inquire whether his opinion is altogether right and those of his fellow-jurymen altogether wrong before coming to a final conclusion from which he will not be moved; that it is hardly possible in a complicated case where there are a great many facts to be considered, for twelve men to at once agree, upon all of them; that in order to secure unity of action among any considerable number of men there must be compromising in their views and opinions; that our whole lives are made up of compromises, and no man has the right at once, and without any reference to the opinions and views of others, to say that he knows more than all the rest.

The court further states that so far as light was concerned, the court had just learned that the county commissioners had ordered the light cut off at eight o'clock, but the court would send for the chairman of the committee on county buildings, and there would be light enough the next night; and he would also instruct

the bailiff to let them out into the main court-room when the
433 court adjourned and the room was closed, should they not agree by that time.

The court thereupon further stated to the jury in substance, that he could not then discharge them, that as the counsel for the respective parties had several times stated to them, the case had been several times tried, and it was extremely desirable that an agreement should be reached. Thereupon one of the jurors inquired, "What are we going to do for something to eat," to which inquiry the court replied, "You had your supper and breakfast, and the bailiff will see that you have your dinner," whereupon the juror remarked, "Suppose we have no money to pay for it," to which the court replied, "Oh, I guess you will get along all right," and thereupon sent the jury back to their room.

Order overruling motion for new trial, judgment entered on verdict.

Exception by defendant. Appeal prayed and allowed to appellate court.

Appeal bond, $8,000 penalty, approved.

Clerk's certificate.

434 & 435 *Errors Assigned.*

1. The said superior court erred in overruling the said motion for a new trial.

2. The said superior court erred in refusing to defendant leave to file the said affidavits and each of them in said cause.

WILLARD & DRIGGS,
A. S. TRUDE,
Att'ys for Appellant.

Cross-errors Assigned.

1. The court erred in refusing plaintiff leave to open and close the case to the jury.

2. The court erred in refusing plaintiff leave to open and close the case to the jury after the evidence was in.

SIDNEY SMITH,
WM. J. HYNES,
Att'ys for Appellee.

(Endorsed:) Filed Jan'y 16, 1891. Wm. H. Bradley, clerk.

436 In the Supreme Court of Illinois, Northern Grand Division, September Term, A. D. 1888.

THE PENNSYLVANIA RAILROAD COMPANY, Appellant, *vs.* WILLIAM J. CONNELL, Appellee.	Appeal from the Appellate Court, First District.

Brief and Argument.

May it please the court:

This was a suit in tort instituted by the appellee to recover damages by reason of an alleged assault and expulsion from one of the appellant's trains at Tacony, Pennsylvania, December 16, 1880.

The subject-matter of the suit was before this court in 1884 when a judgment in favor of the appellee was reversed and the cause remanded. The decision may be found reported in vol. 112, page 295. The facts as recited in the published opinion are substantially the same as those shown by the evidence contained in the present record and a particular statement of the case might perhaps
437 be now omitted. But the pleadings having been changed in some respects, the following is presented as showing both the pleadings and the proof or the tendency of the proof as contained in the record now before the court:

Statement.

In the year 1880 the defendant was a common carrier of passengers for hire between the cities of Philadelphia and New York, and for some time had tacitly permitted the Wabash, St. Louis and Pacific Railway Company to issue and sell coupon tickets for passage over its said line between Philadelphia and New York, in connection with the Wabash Company's own line from Omaha, Nebraska, to St. Louis, Missouri, and in connection also with various other lines, including that of the Baltimore and Ohio Railroad Company from Cincinnati, Ohio, to Baltimore, Maryland. There was, however, no implication that such permission was to continue during any certain length of time.

On December 1, 1880, the defendant telegraphed the Wabash Company to discontinue the sale of tickets to all points north and east of Philadelphia, reading via Baltimore and Ohio railroad, and the defendant's line. A copy of this telegram may be found on page 115, abstract.

On the same day the Wabash Company answered by telegraph saying that tickets reading via Baltimore and Ohio to points east and north of Philadelphia had been ordered off sale. This answer, a copy of which may be found on page 114, abstract, was received by the defendant on or about the day of its date.

On the same day, also, orders were duly issued to the defendant's ticket-receivers (some of whom were stationed at Philadelphia,
438 others at Jersey City, and still others at Trenton, New Jersey), to issue instructions to conductors that tickets issued by the

Baltimore and Ohio or by other companies, via the Baltimore and Ohio prior to December 2d, from points in the south and west, might be honored to December 10th, but after that date the conductors should refuse to accept any coupons of such issue. A copy of this order may be found on page 43, abstract.

Under date December 2d, the defendant issued a "general notice" to railway lines to discontinue the sale of tickets over its line between Philadelphia and New York, or other points via the Baltimore and Ohio, from date, and stating therein that such tickets would not be honored after the 10th of the same month. A copy of this notice may be found on page 91, abstract. The notice was received by the Wabash Company on or about the 3d of December. (Abst., 89.)

The defendant's custom was to have such orders or instructions to ticket-receivers copied into a book at the ticket-receivers' stations. And it was made the duty of conductors to daily consult those books. (Abst., 48.) One of the defendant's conductors, B. F. Wilson by name, received the order from the ticket-receivers at Philadelphia and also at Trenton. (Abst., 19.) He thinks he must have received the order on or before the 5th of December. (Abst., 48.)

The Wabash Company issued a circular under date of December 2, 1880, directed to all coupon ticket agents to discontinue the sale of tickets to New York, Boston and all other points east and north of Philadelphia, reading via Baltimore and Ohio railroad,
439 Baltimore to Philadelphia thence via Pennsylvin-a railroad. A copy of this circular may be found on page 95 abstract.

On the same day, December 2d, the Baltimore and Ohio Company telegraphed from Baltimore to the Wabash Company at St. Louis a request to get up coupon tickets to New York and points east, reading over a number of railroad lines, (not including the defendant's line,) and therein further requested that, until the tickets should be got on sale, to continue sale of defendant's tickets via Baltimore and Ohio railroad and to report entire proportion east of Baltimore to the Baltimore and Ohio Railroad Company, and closed by saying that the Baltimore and Ohio Company were "exchanging and would protect." A copy of this telegram may be found on page 92 abstract.

Complying with this request the Wabash Company continued selling tickets which it had informed the defendant had been withdrawn. There is no evidence that the defendant, before December 16th, had any notice that the Wabash was thus continuing the sale of the tickets.

On December 7th the Wabash's Company's agent at Omaha, Moore by name, sold to the plaintiff a coupon ticket from Omaha to New York via the Baltimore and Ohio Company's line to Baltimore and the defendant's line, Philadelphia to New York, contrary to the defendant's request to withdraw such tickets and contrary to the Wabash Company's notice to the defendant that it had withdrawn such tickets from sale. The ticket was issued and dated and delivered to the plaintiff on the same day, December 7, 1880. The

form of the ticket with coupon attached may be seen page 21, abstract.

Neither the agent Moore or the plaintiff at the time had
440 any notice or knowledge of the defendant's order for withdrawal of such tickets from sale. The ticket thus sold to the plaintiff purported to be a first-class ticket and unlimited as to time for use.

It will be observed that under the defendant's orders to its conductors, this ticket was not receivable by the latter for passage at the time it was issued, nor at the time it was presented on the train in question. And it will be further observed that the Wabash Company's motive in thus issuing the ticket, was a desire to accommodate the Baltimore Company by complying with its request, believing at the same time that the ticket would not reach the defendant's road, but would be exchanged and protected by the Baltimore Company, that is, it would be taken up by the Baltimore Company on its road and a ticket given in its place which would be receivable under the defendant's orders to its conductors. The fact that the Wabash Company relied on the promise of the Baltimore Company to "protect" the tickets thus to be sold, appears from Crane's evidence, page 90, abstract.

The plaintiff started on his journey the same day he bought his ticket, December 7th. He stopped a few days in Washington city, and one day in Baltimore. The Baltimore Company failed in some unexplained way to exchange the plaintiff's ticket, or to protect the same, as it had undertaken, and promised to do. The plaintiff reached Philadelphia December 16th, and from there took the 1.35 p. m. train for New York. Soon after leaving Philadelphia the aforesaid B. F. Wilson, conductor of the train, began to receive tickets and fares, and coming to the plaintiff, who was sitting on the right-
hand side of the car, a few seats from the rear door, he was
441 handed the ticket which the plaintiff had purchased in Omaha as above stated. The plaintiff, at the same time, also handed to the conductor a five-dollar bill, and requested some change, as he desired to buy some newspapers. The conductor received both the ticket and the bill, and after looking at the ticket handed it back to the plaintiff, or as the plaintiff says, tossed it back into his lap, and at the same time informed him that it was not good. The plaintiff then explained to the conductor how he had bought his ticket in good faith and paid for it, and the conductor explained to the plaintiff how he had orders to refuse all such tickets. The conductor demanded fare, and told the plaintiff that unless it was paid he would have to put him off the train. The plaintiff refused to pay fare, and again offered his ticket which the conductor again refused. The plaintiff testified that he then asked the conductor to return the bill, and that the conductor answered that "if he desired to avoid all trouble to pay his fare," and that believing the conductor was about to take pay out of the bill he seized it from him, saying, "I don't propose that you shall steal my money." That the conductor disclaimed any intention of stealing the money, and the plaintiff replied, "You are doing what I consider equiva-

lent to it," whereupon the conductor said, "Now, sir, pay your fare, or I will bounce you off this train." They then separated, the plaintiff going to talk with a fellow-passenger sitting a few seats in front of him, and the conductor going to the rear of the car where he rang the bell for the engineer to stop, which the engineer did, shortly after, at a regular station called Tacony, situated about eleven miles out of Philadelphia. When the train stopped the plaintiff was standing near Mr. Erastus Brooks, of New York,
442 explaining to him the purchase of the ticket, and the conductor's refusal to receive it and the conductor's intention to put him off if he did not pay. The conductor thereupon approached and asked the plaintiff if he was going to get off the train, the train being then standing at the station. The plaintiff replied by again offering his ticket, and not offering to pay $3.25 fare as requested, nor saying he would get off in obedience to the request, he was forcibly put off at the station without unnecessary violence and without insult or intended indignity, as the appellant claims.

The plaintiff returned to Philadelphia during the afternoon, and at 7.30 in the evening took a train for New York over another line, called the Bound Brook route, paying $2.50 for his fare. He reached New York about 10.30 in the evening, and remained in New York and Brooklyn three or four days, and returned to Omaha the night before Christmas.

About January 31st following, the Wabash Company sent to the defendant a report or statement of account for December ticket sales, showing a balance of $637.77 due the defendant, and on the 10th of February following the treasurer of the defendant drew a draft on the Wabash Company for the amount, and the draft was subsequently paid. This report is set out on page 94 abstract, and in it may be found an allowance of $2.52 for the ticket in question.

In January, 1882, the plaintiff began this suit, and in his declaration averred the purchase and sufficiency of the ticket to entitle him to ride on the train, and the defendant's duty to receive it for his passage, and protect him from assaults, injuries and insults whilst on the way. He averred a breach of such alleged duty, and that the conductor, falsely pretending that he had not paid
443 his fare, violently and abusively assaulted him, and with dangerous violence and brutal force, pushed, shoved and dragged him from his seat, and violently shoved and threw him down the car steps, and out upon the station platform, etc. To this the defendant plead the general issue.

A trial was had before the Honorable Elliott Anthony, judge, and a jury, at the June term, 1882, resulting in a verdict for the plaintiff for the sum of $15,000. This verdict was set aside on defendant's motion for a new trial.

At the May term, A. D. 1883, the case was tried before the Honorable Joseph E. Gary, judge, and a jury, resulting in a verdict the same as before. A judgment having been entered on this verdict and afterwards affirmed by the appellate court, the case was brought by appeal to this court, where the judgment was reversed as before stated.

The defense urged was (1) that plaintiff's contract for carriage to New York was with the Wabash Company, and not with the defendant; (2) that the Wabash Company's agency, if any, for the sale of such tickets had been revoked before the sale of the ticket in question; (3) that notwithstanding plaintiff's alleged right to passage on the ticket, it was his duty under the circumstances of the case, to obey the conductor's request to either pay fare as required by the company's instructions to the conductor or to leave the train, and (4), that damages accruing to the plaintiff, by reason of his having been put off (not by unnecessary force) and which damages he could have prevented by paying fare and staying on the train, were not recoverable, although the ticket might have been receivable for passage.

444 This court reversing the judgment, held that the ticket was valid, and entitled the plaintiff to passage, but that under the circumstances, the plaintiff should have yielded to the request of the conductor and maintained his right to passage, otherwise than by forcibly resisting the conductor's demands.

The cause having been redocketed in the court below, the defendant filed by permission two certain special pleas of *son assault demesne.*

The first of these two special pleas sets up affirmatively all the facts in the case as hereinbefore recited, and avers that it was the duty of the plaintiff to obey the conductor, but that he refused so to do, whereupon the conductor gently laid his hands on the plaintiff to remove him out of the car and off the train; that the plaintiff unlawfully resisted and used violent and menacing language and gestures, and would have remained on said train and in said car had not the conductor defended himself, which he did, and with the aid of the brakeman overcame the plaintiff's assault and resistance, and put him out of the car, and in so doing did necessarily and unavoidably a little bruise and wound the plaintiff, but doing no unnecessary injury to him, etc., and concluded with a verification.

The second plea is the same, except it is more general in its averments. (See pages 6–10, Abst.) To these pleas the plaintiff filed two replications, denying the alleged assault by the plaintiff and concluding to the country. Upon these replications the defendant added a similiter.

The cause came on for trial in May, 1886, before the Honorable Kirk Hawes, judge, and a jury. The defendant, upon leave
445 given, withdrew its plea of the general issue, and the trial took place upon the issues formed upon the special pleas. (Abst., 14.) The jury were unable to agree, and were accordingly discharged.

In February, 1887, the case was called by the Honorable Joseph E. Gary for trial. The plaintiff thereupon moved for an order for repleader. The motion was overruled, and the plaintiff then moved for leave to withdraw the replications, and for leave to file a demurrer. This motion was also overruled, the plaintiff taking exception. (Abst., 14, 15.)

The case was then sent before the Honorable Kirk Hawes, judge, for trial. The plaintiff there moved for leave to open and close the case to the jury, and the motion having been denied, the motion was renewed after the evidence was in, and was then denied also, to which the plaintiff excepted. The jury found for the plaintiff, fixing the damages at $7,000. The defendant moved for a new trial, the grounds for which may be found stated — Abst., 162. The motion was overruled and judgment entered. That ruling and the refusal of the court to permit certain affidavits to be filed, are the errors assigned upon appeal to the appellate court.

The appellate court affirmed the judgment of the superior court. The opinion has not yet been reported, but a copy of it may be found appended.

An appeal was prayed and allowed to this court, and the error assigned upon the record now before the court is the appellate court's affirmance of the judgment below.

446 *Brief.*

I.

An important question raised by the record in this case is the following:

Where a ticket agent wrongfully, but acting in good faith, sells a certain kind of ticket which under the rules of the company cannot be received by the passenger conductor, may the passenger having it reasonably within his power to pay a cash fare, but acting in good faith, refuse the conductor's *bona fide* request for such payment, and recover damages on account of delay occasioned by his ejection from the train, no unnecessary force being used.

The court below ruled that in such case such damages might be recovered. (See plaintiff's 7th instruction, given, Abst., page 149; and defendant's 12th instruction, refused, Abst., page 158.) That ruling is contrary to the decisions in the following cases:

Railroad Co. *v.* Finnegan, 21 Ill., 646.
Williams *v.* Chicago Coal Co., 60 *id.*, 149.
Dobbins *v.* Duquid, 65 *id.*, 464.
Railroad Co. *v.* Griffin, 68 *id.*, 499.
Railroad Co. *v.* Eddy, 72 *id.*, 138.
Railroad Co. *v.* Hall, 9 A. & E. C., 349.
Miller *v.* Mariners' Church, 7 Greenl., 51.
Sutherland *v.* Wyer, 67 Me., 64.
Hamilton *v.* McPherson, 28 N. Y., 72.
Dillon *v.* Anderson, 43 *id.*, 231 (4 Hand.).
447 Townsend *v.* Railroad Co., 56 *id.*, 295.
Rexter *v.* Starin, 73 *id.*, 601.
Chamberlain *v.* Morgan, 68 Pa. St., 168.
Loker *v.* Damon, 17 Pick., 284.
French *v.* Vining, 102 Mass., 132.
Bradshaw *v.* Railroad Co., 135 *id.*, 407.
Mather *v.* Butler, 28 Iowa, 253.

Simpson *v.* Keokuk, 34 *id.*, 568.
Beymer *v.* McBride, 37 *id.*, 114.
Alexander *v.* Railroad, *id.*, 264.
Little *v.* McGuire, 43 *id.*, 447.
Keys *v.* W. Vt. S. Co., 34 Vt., 81.
Hitchcock *v.* Hunt, 28 Conn., 343.
Waters *v.* Brown, 44 Mo., 302.
Wing Chang *v.* Mayor, &c., 47 Cal., 531.
Gilbert *v.* Kennedy, 22 Mich., 117.
Wards, etc., *v.* Elkins, 34 *id.*, 217.
Frederick *v.* Railroad Co., 37 *id.*, 342.
Railroad Co. *v.* Peirce, 47 *id.*, 277.
Gordon *v.* Brewster, 7 Wis., 355.
Yorton *v.* Railroad Co., 54 *id.*, 234.
Railroad Co. *v.* Ragsdale, 46 Miss., 458.

The gist or principle of the foregoing decisions is that the law requires of a party injured from another's tort or breach of contract the active duty of making reasonable effort to render the injury as light as possible, and that the compensatory damages which he may recover are limited to such as he could not prevent by the use of reasonable exertions.

Emphatic declarations and strong arguments in support of the rule, as applied to cases like the present, may be found quoted in the following synopsis of some of the decisions above cited.

448 In the case of Griffin, *supra* (68 Ill., 499), the court held as follows:

"If a passenger pays his fare to a certain station, and the ticket agent inadvertently gives him a ticket to an intermediate station, the demand of fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying on such demand, his action will be as complete as if he resists the demand, and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable reparation for the indignity, he can maintain his appropriate action."

In the case of Hall, *supra* (9 Fed. Rep., 585), the plaintiff acted upon the assurance of the ticket agent that the tickets which he had bought and paid for as unlimited tickets would be received at any time, although on their face they purported to be limited to use within thirty days. The tickets were presented for passage after the expira- of thirty days, and their acceptance being against the conductor's orders, he requested payment of a cash fare; the request was refused by the plaintiff, although, like the appellee here, he had money with which to make such payment. He was ejected from the train and afterwards brought suit for damages. The court directed a verdict for the defendant upon stipulation that the defendant should submit to a verdict for the extra fare paid by the plaintiff the next day for tickets to his destination if the court should conclude the company were liable for it. We quote as fol-

lows from the opinion of the court, overruling the plaintiff's motion for a new trial:

"If there be mutual mistakes and mutual neglect, or even a mistake by the carrier alone, it does not follow that the passenger can demand that all the regulations shall be set aside to cure the mistake, but only that it must be by conference with the proper officers (and the conductor on a moving train is not in a case like this one of these) adjusted, and if this be refused, proper damages
449 may be recovered. But the proper damages are not such as the unfortunate passenger may receive by absolutely insisting on a violation of the ordinary regulations by subordinate officials, for whose guidance the regulations are a necessity to cover a case clearly outside of them. If the plaintiff had been penniless, I need not say whether the principle would be changed. Perhaps not. But here there was money sufficient to have paid the extra fare, as it was afterwards paid, and the plaintiff's duty was to have paid it that night, and sue for a breach of his alleged contract, and not to force an ejection and lay the foundation for larger damages than a suit on the contract would have given him. Suppose he had continuously refused to pay further fare and remained continuously at the place where he was ejected, can it be said he could have recovered for all that delay in reaching his destination? Why, then, should he not pay at once and go on, as to pay later and go on, to avoid contributory negligence? * * *

"A very vigorous protest is made by the argument against the doctrine of contributory negligence as applicable to a case like this, but it is only at best a controversy about terms. Perhaps it is more technically correct to say that the conduct of the conductor of the train being unobjectionable, the injury complained of was not the direct result of any fault of his or the defendant corporation which he represented, and it is not, therefore, liable to the plaintiff, but it could have been prevented if the plaintiff had chosen to pay the fare demanded, and in that sense it was the result of his own negligence rather than anything the conductor did."

In the case of Frederick, *supra* (37 Mich., 342), the agent by mistake gave the plaintiff a wrong ticket, same as in the Griffin case, and he was put off the train because he refused the conductor's request for fare from the station which the conductor claimed the ticket designated to the station which the plaintiff claimed he had paid for. The court held that, although the plaintiff had paid his fare as he claimed, yet having no ticket to show for it, he was in duty bound to comply with the conductor's request for additional fare, and that allowing himself to be ejected from the train added nothing to his cause of action. We quote from the opinion as follows:

"An erroneous impression seems to prevail with many
450 that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to proceed farther or upon that train, that the company is liable in an action at law for all damages which the party may in any way have

sustained in consequence of the delay, mortification, injury to his health or otherwise, and that the passenger is under no obligation to prevent or lesson the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. Although such damages were claimed in this case, under our present view it will be unnecessary to discuss this question any farther at present."

In Railroad Co. *v.* Peirce, *supra* (47 Mich., 277), the plaintiff was informed by the ticket agent that a certain train stopped at B, and the plaintiff relying on that information took passage accordingly. While on the way and when called on for his ticket he was informed by the conductor that the train did not stop at B, and that he would have to get off at A (which was a station short of his destination), or pay additional fare to C, a station beyond his destination. The plaintiff refused to do either, and he was accordingly put off the train. He brought suit and recovered a judgment below for damages, which presumably included damages for indignity in being put off the train. On appeal, the court, reversing the judgment below, held:

"He could recover no damages unless for some unlawful violence beyond the necessities of the removal, because it was lawful to take such steps as were necessary to remove and keep him removed from the train. He cannot complain of an indignity which it was his duty to avoid incurring and which he was bound to expect."

In the case of Yorton, *supra* (54 Wis., 234), the conductor of one train erroneously gave out a train check as a stop-over ticket. The train check, when presented to the conductor of another train for the plaintiff's passage thereon, was refused and a cash fare
451 demanded. Payment was refused and the plaintiff was put off the train at 3.30 o'clock in the morning. The depot was closed, and, unable to find shelter, he was exposed to cold, damp winds, which caused sickness. That sickness constituted his principal claim for damages. On the trial below the court charged that the plaintiff was entitled to recover full compensatory damages, not only for the mere pecuniary loss and expense, loss of time, and inability to attend to his business directly resulting from said acts, but also for bodily suffering, mental pain and the sense of injury felt from the indignity inflicted in being so unjustly expelled from the cars. The court held that the charge was erroneous and the judgment was reversed on that ground. We quote as follows from the opinion, page 239:

"It is apparent that the right of the plaintiff to ride on the train without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights which could not coexist at the same time. Therefore, under the rule of the company, the second conductor was clearly authorized and required to put the plaintiff off his train when he refused to pay fare, using no more violence than was necessary to accomplish his object; for the plaintiff had no right to remain on the train without a proper voucher or producing some evidence showing he was en-

titled to carriage on that train without paying additional fare." * * *

"Putting the plaintiff off the train then was not an unlawful act. It was what the second conductor was bound to do in the discharge of his duty to the company. It is true, as a consequence of being ejected at that place, at that time in the night, he contracted a violent cold and became sick. But this exposure he really brought on himself by his own conduct. Why then should he complain about it? * * * Under the circumstances he ought not to recover damages for any exposure or sickness which he brought upon himself by his own foolish perverse conduct. For as we have said he was not entitled to a passage on that train and was rightfully removed therefrom."

In the case of Bradshaw, *supra* (135 Mass., 407), the plaintiff had paid his fare, but owing to some fault of the conductor of a
452 former train, he was without a ticket or transfer check, and, refusing to pay a second time, he was put off of a connecting train by another conductor. We quote from the opinion of the court as follows:

"It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract to give him a check showing that he was entitled to travel in the second car, and that it failed to do so; in consequence of which he was forced to leave the second car. * * *

"The conductor of a street-railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual simple and direct way. The checks used on the defendant's road were transferable, and a proper check when given might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of his contract. Otherwise, the conductor must investigate and determine the question as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be either that the railroad company would find itself obliged, in common prudence, to carry every

passenger who should claim a right to ride on its cars, and thus submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public and deprive them of the facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or show a check or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger,
453 without such evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield for the time being to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that in a moment of irritation or excitement it may be unpleasant to a passenger, who has once paid, to submit to an additional exaction. But unless the law holds him to do this, there arises a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded, and a forcible collision might ensue. The two supposed rights are, in fact, inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket, or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be after his refusal to pay a fare, and that he might properly be ejected from the car.

"This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendants, and no case has been brought to our attention holding the contrary. Judgment for the defendant."

In the case of Dobbins, *supra* (65 Ill., 464), the defendant Dobbins inadvertently, as the court held, ousted the plaintiff from certain premises and put another in possession. Afterwards, upon becoming aware of the real facts in the case, the defendant offered to put the plaintiff in possession of other premises which would have answered his purpose nearly as well as those from which he had been evicted. This offer the plaintiff refused and brought suit for damages. The court held that the plaintiff wrongfully refused the defendant's offer and reversed the judgment, because the damages had been assessed on a different basis. We quote from the opinion as follows:

454 "The lessor of the plaintiffs was unquestionably liable to them for any loss to their business which could not reasonably have been avoided as they had been deprived of the use of the ground by the second leasing and the possession flowing from it. The law, however, imposes a duty upon them. It requires them to

make ordinary and reasonable effort to prevent any loss. They had no right to look exclusively to the recovery of damages for compensation, but must exercise the same prudence to guard against loss as if they had no other redress."

The principle of the Dobbins and Griffin cases is the same, and it underlies the rule which is uniformly applied to all actions sounding in damages.

The rule holds even where fraud or malice is the gist of the action. In such cases its application may be relaxed, but not wholly denied.

If A wilfully throws down his neighbor's fence, so that cattle may enter the latter's field and destroy his crops, he cannot refuse to restore the fence, and look exclusively to the recovery of such damages as the cattle shall do unrestrained by any effort on his part. In such case he must repair the fence, if reasonably within his power to do so, and seek his remedy in a recovery of punitive damages for the malicious intent, and such actual damages as the use of proper care did not operate to prevent or lessen.

In the case of Finnigan, *supra* (21 Ill., 646), the plaintiff's cattle strayed upon the railroad track, there being no fence, and were wounded by a passing train. The court below gave the plaintiff judgment for the full value of the animals before they were hurt, notwithstanding the evidence showed that their value was not entirely destroyed, and that the plaintiff could have made beef of them. This court held that such allowance was error, and reversed the judgment accordingly. We quote from the opinion as follows, page 649:

455 "The proof shows that the cow and steer were both fat, and were worth, one ten dollars, and the other twenty dollars, for beef, and were good for beef, they having been injured in the legs. We hold, under such facts, that it was the duty of the owner to have disposed of them to the best advantage, if practicable. He should have made some effort to make them available, and had no right to abandon them wantonly, and then claim their full value. The company had a just claim on the owner to do so, and thus reduce, as much as possible, the damage and injury. The criterion of damages in such case is the value of the cattle as injured and their value before injury. If, after the injury, they were as valuable for beef, as the proof shows, as before the injury, and the owner wantonly abandoned them, he ought not to recover their value. If one leaves a gate of another open, by which some slight injury is done to the owner of the gate, the owner has no right to leave it open in order that he may thereby charge the delinquent party for any and all injury he may suffer thereby. He should shut the gate."

Such is the principle of the decision of this honorable court on the former appeal of this case. The Griffin and Hall cases were cited with manifest approval, and it is not possible that the court intended to overrule them and other decisions in strict analogy therewith, and hold that the plaintiff might recover damages for delay in

his journey, regardless of the question, whether it was reasonably within his power to prevent such delay.

The evidence shows that by complying with the conductor's request, for payment of a cash fare of $3.25, the plaintiff would have avoided and prevented all other alleged resulting losses and damages.

The evidence further shows that he had more than that amount of ready money with him, and had also a draft for $500, payable in New York, a distance of about three hours' ride.

Upon what rule or principle of law, then, might he refuse to pay the additional fare requested, $3.25, and thereby knowingly aggravate his damages, at another's cost?

456 If the plaintiff could rightfully neglect or refuse to use the means reasonably within his power to avoid being put off the train and delayed, and hold the defendant for damages resulting from such neglect or refusal, then by parity of reason he could rightfully have neglected to use the means reasonably within his power to avoid a continuance of that delay, and, instead of returning home and resuming his law practice and the receipt of his income therefrom, he could rightfully have remained at Tacony in idleness and held the defendant in damages as for a continuing loss of that income.

As indicating the ground upon which the honorable appellate court affirmed the judgment below, we quote as follows from the opinion. See appendix:

"The man who is rightfully on a train, and produces to the conductor conclusive evidence of his right, cannot be in a more unfavorable position, as regards his claim to damages, when forcibly expelled by the servants of the company than one who is a trespasser on the car and insists on remaining wholly without right. Yet, very considerable verdicts have been sustained where excess of force was used in removing a trespasser from the train, and injury resulted, or where the result was merely inconvenience."

Can it correctly be said that the plaintiff's ticket was conclusive evidence of his right to passage? It seems to us not. It certainly was the conductor's duty to inspect the ticket and if on its face it did not fulfill the requirements of his orders, it was his further duty to refuse to receive it, and to request payment of a cash fare. The ticket which the plaintiff presented and insisted should be received for his passage, did not, on its face, fulfill the requirements of the conductor's orders. It bore date December 7th; whereas, on December 2d, all tickets of that kind were withdrawn from sale.

457 Therefore, under the conductor's orders, and so far as the conductor knew, tickets of the kind in question, bearing date subsequent to the 2d, were unauthorized. It does not appear that the ticket was *prima facie* evidence even of a right to passage.

II.

The plaintiff's said seventh instruction (Abst., 149) submits to the jury, as a ground for the assessment of exemplary or punative dam-

ages, the question whether "the acts of the conductor in refusing plaintiff's ticket, demanding fare, and ejecting the plaintiff from the car, were willful, wrongful and malicious, and the result of a wrongful and reckless indifference of the rights of plaintiff."

There is, we think, absolutely no evidence contained in this record which warrants the submission of that question to the jury.

The plaintiff, himself, tacitly admits that there was nothing about the conductor's language or the way he acted to lead him to believe he was not acting in good faith. The plaintiff testifies specifically: "I did not question his good faith, except in refusing to return my money." (Abst., 73.) But there was no "refusal." According to the plaintiff's detailed statement of the affair, he merely thought the conductor was going to put the money in his pocket. Following is the plaintiff's testimony as to what occurred (Abst., 53):

"'Well,' he said, 'I will have to take your fare,' and as he made that remark, having the money in his left hand he made a motion to transfer it to his other hand and noticing what he was doing and hearing that remark, I said to him: 'Mr. Conductor, I wish you would return my money; if we are to have any misunderstanding concerning the ticket, let us settle that on its merits, but I
458 desire that you should return my money,' and in place of doing that he said to me, 'If you desire to avoid all trouble, pay your fare,' and he continued the motion as if to put it in his pocket, when I suddenly reached forward and seized the money and so got it from his hand. * * * I just twisted it out of his hand, and as I did so I said, 'Mr. Conductor, I don't propose that you should steal my money from me,' and he responded, 'I was not stealing your money, sir,' and I said 'You are doing what I consider equivalent to it; I handed it to you for the purpose of making change and you have no right to appropriate it for any other purpose,' and he then turned to me and said, 'Now, sir, pay your fare or I will bounce you off this train.'"

We respectfully submit that this statement of the plaintiff ex*hon*erates the conductor from any intent to do injustice.

It is error to give an instruction which has no proper foundation in the evidence.

Railroad Co. *v.* Patterson, 63 Ill., 304.
The Howe S. M. Co. *v.* Layman, 88 *id.*, 39.
Railroad Co. *v.* Harwood, 90 *id.*, 425.
Ins. Co. *v.* McKee, 94 *id.*, 494.
Stern *v.* People, 102 *id.*, 540.

In the case of Patterson, *supra*, the court below gave an instruction that if the jury found for the plaintiff, in assessing his damages they were not confined to the actual damages which resulted from being expelled from the cars against his will, but the jury might take into consideration the annoyance, vexation and delay caused thereby, and also the indignity done him by so expelling him and exposing him to the ridicule of others. This court held that the instruction was erroneous, there being no proof that injury

and indignity had been inflicted from which malice might be shown or inferred, and the judgment was reversed for that reason.

459 III.

The plaintiff's seventh instruction (Abst. 149) submits to the jury, also, the question whether "the conductor or brakeman in a reckless or wanton manner used more force than was reasonably necessary for the purpose of ejecting" the plaintiff, if so, then the jury might allow him as damages such sum as would fairly compensate him therefor, etc.

We desire to call the attention of the court to the point whether there is any evidence in the record which warrants the submission of that question to the jury.

Take the plaintiff's own statement of the manner of his expulsion, as found on pages 52 to 59 abstract, and consider it in connection with the admitted fact that the plaintiff did not question the conductor's good faith (except in a supposed refusal to return the bill) and the conclusion is a fair one that the conductor and brakeman are blameless. Beginning with the time when the train stopped and the conductor approached the plaintiff, near the middle of the car, where he was talking to Mr. Brooks, the plaintiff's evidence, stripped of its redundancy, is substantially as follows:

"The conductor (Abst., 55) then came up and took me by the right shoulder and jerked me around towards him and said: 'Are you going to get off this train, sir?' I said: 'I have tendered you my ticket once, and I will tender it to you again,' but, without giving me any opportunity to get out or get my things, he seized my hand with one of his, and with his other caught me by the shoulder and jerked me towards the rear of the car. I got perhaps to the second seat, when I merely pulled back with my right hand and resisted his efforts to pull me down in that rapid way. He jerked me so violently and roughly that the ticket was in some way thrown out of my hand. And (Abst., 56) I said to him: 'If you are
460 determined to put me off, let me take my ticket.' He paid no attention to that, and I continued jerking back and endeavoring to get my ticket. I got back to the seat and secured the ticket in my left hand again, and protected it by my thumb. He caught me by my fingers with his hand and by the shoulder, as he had before, and dragged me a little way, and the brakeman then took me by the right wrist and also the shoulder, and we reached the door in that way. The brakeman went out first and turned to the right; I came next, the conductor having me by the left hand. When we reached the door, the brakeman, for the purpose of getting through the door himself, or for the purpose of getting me through it, turned my right hand upward, and just at that time the conductor gave me a violent push which struck my elbow against the jamb of the door, striking what is known as the crazy bone. The blow was so violent that it somewhat shocked me. Then we proceeded down the steps, the conductor going first (Abst., 57), I second, and the brakeman behind. I knew the steps

were slippery with ice, and for the purpose of protecting myself against the conductor's violent pulling by left hand, I reached (took hold of) the rail. The brakeman put his hand over mine, and broke my hold, and the result was, when I went down I struck my back on the cross-beam, or on the corner of the steps. The conductor then seized me by the other hand, and, not wishing to offer further resistance, I said to him: 'I am off your train, and don't propose to get on again, and I demand of you to let me go.' But he kept hold of my hand, and crowded (Abst., 58) me back and held me there till the brakeman went in and brought out my overcoat and satchel, and threw them down. The conductor then let go, and signaled the engineer and got on the car, and the train passed along, leaving me standing there.

"I offered no resistance after reaching the door and having my elbow struck. I did resist up to that point, but not to the extent of fighting back or endeavoring to injure the other parties, but merely holding back and objecting to being hustled out in that sort of way. I had my left hand free up to the time the brakeman seized it, and could have used it, but I didn't wish to get into a fight."

The evidence of what transpired between the plaintiff and the conductor and brakeman, as shown by the former record, is substantially the same as that shown by the present record. With reference to the former record it is stated in the published opinion of the court (vol. 112, 304) that it "did not appear that more
461 force was used than necessary," and page 306, that "so far as appears he (the conductor) acted in good faith."

It seems clear that the submission of the question of excessive force was unwarranted by the evidence.

IV.

Plaintiff's third instruction allows the jury to assess the plaintiff's damages without reference to the evidence. (Abst., 148.) The language is:

"If from all the evidence and under the instructions you find for the plaintiff, then, in fixing the amount of the damages you will award, it will be proper for you to allow the plaintiff the cost of a ticket from Tacony to New York, and such damages as he sustained, if any, on account of the delay occasioned by being required to leave the train," etc.

It will be observed that after the words "and such damages as," there should have been inserted the words "you shall believe from the evidence."

With those words omitted, the defendant was deprived of the protection which the juror's oath would otherwise have afforded. The jury had a right to follow the instruction, and the instruction did not require any consideration of, or finding from, the evidence, in the particular mentioned.

Such an omission has repeatedly been held by this court to be error.

Railroad Co. *v.* Sykes, 96 Ill., 162.
Rolling Mill *v.* Morrissey, 111 *id.*, 646.

462 V.

Plaintiff's first instruction (Abst., 147) declares that the ticket presented by the plaintiff was a valid, proper ticket, and that the conductor had no legal right to refuse to accept the same. And his third instruction (Abst., 147, 148) declares that, although it was the duty of the plaintiff to obey the conductor, yet the defendant had no legal right to order him to leave the train or to demand a cash fare.

Each of these instructions is confusing, misleading and erroneous.

The ticket presented did not, under the conductor's orders, properly evidence the plaintiff's right to ride, because it was issued and dated after a time subsequent to which such tickets were not to be issued or received. The plaintiff's right to passage rested in his having paid his fare in good faith to an agent of the defendant. The conductor's right to require payment of fare to himself rested in his having been offered no proper evidence of its prepayment to the agent.

These rights being in conflict, both could not be enforced at the same time. One had to take precedence of the other, and this court having decided that the conductor's right should take precedence, and that the plaintiff's right should be adjusted at a subsequent time, left the conductor's right in the ascendency, and so far as the jury were concerned, precisely the same as though the plaintiff's right had not existed. Therefore, for the court, by an instruction to tell the jury that the plaintiff had a right to passage and that the conductor had the right to put him off, was confusing and misleading to them, and they not unlikely escaped from the dilemma by concluding that the plaintiff's right stood alone.

463 VI.

We desire to call the court's attention to a number of rulings relating to the evidence.

On page 115, Abstract, counsel for defendant asked one of its witnesses how the Baltimore and Ohio Company would or might "protect," as provided in its telegram of December 2d to the Wabash. And on page 116 appears an offer of proof in that regard. This telegram is shown on page 92, Abstract.

The question was objected to. The court sustained the objection and allowed an exception.

The proof offered tended to show good faith on the part of the Wabash Company (who, it will be borne in mind, is held to be the defendant's agent) in placing reliance upon the promise of the Baltimore and Ohio to see to it that no wrong should result from the action of the Wabash, if and when taken by it according to the Baltimore and Ohio Company's request.

If it were deemed by the jury impossible or uncertain that the Baltimore and Ohio Company could have afforded the promised protection, and the Wabash were deemed by the jury to have been aware of such impossibility or uncertainty, then its alleged reliance upon that promise might very well have been regarded as a sham

and a pretense, and the defendant justly punishable for the action of its agent, the Wabash, in that regard. Hence the importance to the defendant of the proffered evidence. The evidence was admissible.

Roth *v.* Smith, 41 Ill., 314.
Johnson *v.* Jones, 44 *id.*, 142.

464 On page 122 of the Abstract, Doctor Lee, being on the stand and under direct examination by defendant's counsel, was asked this question:

"Q. In speaking about the leg, these nerves, and so forth, you are the same gentleman that treated these bomb-struck policemen, are you not?"

The court sustained plaintiff's objection to this question and allowed an exception.

This we submit was competent. There was no mistake or doubt who the "bomb-struck policemen" were, nor the general character of their injuries. The question tended to show the experience, and therefore the competency of the witness, as a physician and surgeon.

Street R'y Co. *v.* Lambert, 119 Ill., 255.

VII.

The record shows (Abst., 162) that upon the hearing of the motion for a new trial the defendant upon due notice to the plaintiff, produced certain affidavits in support of said motion and asked leave to file the same and each of them in said cause, but that the court upon reading the same and upon consideration thereof refused the motion, to which ruling the defendant excepted.

The affidavits presented may be described as follows.

1. An affidavit by Joseph C. Finch, a stenographer, showing what was said by plaintiff's counsel to the jury in his closing address to the jury. (See Abst., 163.)

2. An affidavit by David Callahan, a law student, setting forth what was said between the court and jury after the jury had retired and before verdict rendered.

465 3. An affidavit by John W. McMillan, foreman of the jury, upon the same subject. (Abst., 184.)

4. A second affidavit by said John W. McMillan, upon the same subject.

5. An affidavit by one of defendant's attorneys, tending to show that what was said between the court and jury as delineated in the foregoing affidavits took place during adjournment of court and in the absence of counsel for defendant, and without notice to them.

The affidavits are believed to be entirely unobjectionable in themselves, and that to file the same was the only way of getting their subject-matter before the court. It has been the practice to file affidavits in such cases, and this court has given such practice recognition.

Hughes *v.* People, 116 Ill., 330.

The question of admissibility of Finch's affidavit should be considered, we think, in connection with an incident on the trial of the case, viz:

On defendant's cross-examination of the plaintiff he was asked (Abst., 75) whether he proposed to go voluntarily off the train, and the plaintiff replied, "No, he did not." Plaintiff's counsel thereupon said that "a man who will go off at the *ipse dixit* of one of the autocrats of a railroad is a sneak." The remark was objected to by defendant's counsel. And the court said "it was not proper to make these statements in the presence of the jury." Counsel for plaintiff thereupon replied: "The statement is withdrawn; he would not be a sneak." Defendant's counsel objected also to that remark, and the court said: "Let it appear in the record that the court instructs counsel that such remarks are not proper in the presence of the jury."

466 The address to the jury, as set forth in the affidavit, tended, we think, very strongly to unduly prejudice the jury against the defendant.

True, no objection appears of record to have been made to the address, either in whole or in part. The record, however, does show that an objection was made to counsel's aforesaid remark in the presence of the jury whilst the evidence was being heard. (Abst., 75.) And shows also the reproof then and there administered by the court, but the manner in which the objectionable remark was withdrawn or the apology offered simply intensified in the minds of the jury the prejudice which the remark itself is supposed to have caused.

Cases are numerous where such remarks have justly operated to reverse the judgment obtained under such circumstances, and such reversal we submit is the only effectual way of staying the objectionable practice. We cite the following decisions on this point:

Felix *v.* Scharnweber, 119 Ill., 445.
Bonnett *v.* Glatfeldt, 120 *id.*, 166.
Henry *v.* Railroad Co., 121 *id.*, 264.
Bullard *v.* Railroad Co. (N. H.), 5 Atlantic Reporter, 838, and cases there noted.
Henry *v.* Railroad Co. (Iowa), 30 Northwestern Reporter, 630, and cases there noted.

The statements contained in the affidavits of Callahan and McMillan are mainly corroborated by a statement by the court as to what transpired in that regard. (See Abst., 188.)

The fact that the honorable judge acted from the purest motives and the best of intentions, needs no corroboration from any source.

467 Nor is it necessary or material to inquire whether the honorable judge's conversation or interview with the jury or his verbal instructions to them, on that occasion was prejudicial to either of the parties, and if so, to which one of them.

It is the policy of the law to prevent such interviews, by setting aside what follows, regardless of the question whether any harm

was done on the particular occasion or not. The cases are numerous and emphatic on this point. We cite:

Crabtree *v.* Hagenbaugh, 23 Ill., 289.
Fisher *v.* People, *id.*, 218.
Farnum *v.* Farnum, 73 *id.*, 497.
Green *v.* Telfar, 11 How. Pr., 260.
Plunkett *v.* Appleton, 51 *id.*, 469.
Taylor *v.* Betsford, 13 Johns., 486.
Bank *v.* Misc, 51 N. Y., 558.
Sargent *v.* Roberts, 1 Pick.. 337.
Reno *v.* City Cambridge, 124 Mass., 567.
Fish *v.* Smith, 12 Ind., 563.
Fox *v.* Union Depot, 7 Mo. App'd Rep., 593.
State *v.* Alisconda, 66 Mo., 148.
Edens *v.* Railroad Co., 72 *id.*, 312.
Herberg *v.* State, 3 Minn., 264.

468 *Argument.*

It seems incredible that the facts in this case could be made to form the basis of a recovery of more than the amount required of the plaintiff by the conductor for passage on his train.

The defendant has a right to be a corporation, and as such to operate its line of railroad. Its road is but one of many chartered by the several State governments and now in operation. It, alone, independent of contract with the Philadelphia, Wilmington and Baltimore; the Baltimore and Ohio; Marietta and Cincinnati, and the Wabash, St. Louis and Pacific, and each of them could not furnish the public with through tickets from Omaha to New York, nor from New York to Omaha over the lines which the plaintiff traveled, on the journey in question. A specific or tacit agreement was necessary on the part of each one with all the others in order that such tickets might be furnished to the public. Now it appears that there was no existing arrangement between the defendant and the Baltimore and Ohio for the issuance of such tickets on and after the 2d of December, 1885, and consequently none on the 7th of December, when the plaintiff bought his ticket. The absence of such an arrangement did not imply an illegality. It does not appear that the absence of such an arrangement even afforded grounds for criticism. But if it did, then upon which one or more of the companies named is the blame to be laid, either wholly or in part. The record affords no answer to the question. The fact then that the defendant
469 and the Baltimore and Ohio were in a "fight," as the plaintiff testified the conductor told him, is of no consequence.

The act of the defendant, in telegraphing the Wabash, on the 1st December, to cease issuing through tickets via the Baltimore and Ohio and the defendant's line, and the issuance of the circular of the 2d December, and the giving of the instructions to its conductors, were entirely legitimate and proper acts, and can form no just basis for the assessment of any damages whatever. Except that the Wabash Company had issued the ticket in question, without any

knowledge on the part of the defendant, this controversy could not have arisen.

Why, then, did the Wabash issue the ticket? The Wabash issud the ticket in obedience to the request of the Baltimore and Ohio, and for its combination, believing that no harm or inconvenience would come to any one on account thereof, because the Baltimore and Ohio had said they were exchanging and would protect. The action of the Wabash was well intended. There was nothing culpable about it. Nothing that the plaintiff or the public could justly complain about, assuming that it was in the power of the Baltimore and Ohio to fulfil its undertaking to protect the ticket. The reason why the Baltimore and Ohio failed in that regard does not appear. The fact that it failed is a fault on its part, and the only fault on the part of any one leading to the presentation and refusal of the ticket on the train.

Now, why did that little spark kindle so great a fire?

The plaintiff and the defendant's passenger conductor meet upon the train; the former a well-known citizen in his county, a man of business affairs, a lawyer presumably having a correct understanding of the relations and duties of master and servant, princi-
470 pal and agent; the latter a trusted employé during nearly a decade of years, and upon whose care largely rested the lives of those upon his train. Both are of mature years, and gentlemen. The conductor calls for tickets, and the plaintiff responds, but not to the former's satisfaction, as the ticket was clearly not good on its face and under his orders and instructions. Mutual explanations follow, but without satisfaction to either. The conductor is in a hurry, as conductors generally are. The plaintiff, lawyer like, wants to argue the point—wants "to settle it on its merits," as he says. With an evident desire to cut off or curtail argument the conductor says, "If you desire to avoid all trouble, pay your fare." Then it was that the plaintiff misinterpreting the action of the conductor evidently loses his temper and snatches from the hands of the conductor a bank note, and in explanation of his movement virtually accuses the conductor of a desire or intention to steal the plaintiff's money. That was a rash act. It may not have been an ungentlemanly act from the plaintiff's standpoint because he thought the conductor was going to take fare out of the note. But it was an ungentlemanly act from the conductor's standpoint, because he had no intention of appropriating or stealing the plaintiff's money. The act of the plaintiff elicits the response, "Now, sir, pay your fare or I will bounce you off this train." This was forcible. It was not elegant. It was, however, exactly on a par with the plaintiff's chosen words. The plaintiff, still neglecting to pay, the conductor signals the train to stop, which it does at a regular station. The plaintiff still neglects to pay or to get off. The conductor is obliged to either use force to put him off or to allow him to remain on board in violation of his orders or
471 instructions. Both are aware of that fact. The result is that the necessary force is used, and the plaintiff is put off notwithstanding his violent resistance. When upon the station plat-

form the plaintiff said that "not wishing to offer further resistance, I said to him (the conductor) I am off your train and don't propose to get on again, and I demand that you let me go."

The conductor nevertheless kept hold of him a little while, till the train started. This was proper enough, because the plaintiff might very naturally resort to a little artifice to regain the train.

Now that was a serious and unpleasant duty on the part of the conductor, and the plaintiff, having it reasonably within his power, should have avoided the necessity of its performance. Himself conscious of having paid his fare on receipt of his ticket, he should have accorded to the conductor a consciousness that the ticket was not good under his instructions.

May the general of an army pass the guard without the countersign? None will say that he may, and the guard that would permit him to do so would be court-martialed and punished. So with this conductor. The plaintiff himself would have looked upon the conductor with contempt the moment he was conscious that he had driven him from his post or overawed him in the performance of his duty.

A conductor is in a sense a commander, and should be fit to be entrusted with the lives of his passengers. Disobedience to his requests made in good faith may justly be deemed a discredit to any person submitting himself to be carried upon his train.

472 The legislature has invested conductors with police powers. They are in a material sense officers of the law, and they are held to a strict accountability for the safety of those in their charge. (Railroad *v.* Pillsbury, unreported.)

The plaintiff should have realized that if he was entitled to ride without paying a cash fare to the conductor then the demand of the conductor was a breach of his contract, and that by paying the amount demanded all actual damages would be limited to that sum without impairing his right of action against the company.

Compliance with the demand of the conductor involved no surrender of true independence in the exercise of a legal right; no compromise of true self-respect.

The facts of the case being such only as pertain to legitimate and proper business methods on the part of the defendant, is it just that the charge of malice toward the plaintiff on the part of the conductor, and a wrongful and reckless indifference of his rights by the defendant should be brought before the jury by argument and by instruction and the jury invited to give exemplary or punitive damages for the purpose of deterring the defendant from like conduct in the future?

Is a mere mistake on the part of a railroad company and an honest discharge of duty by a tried and faithful employé to be treated as misdemeanors and punished as such? If not, whence the verdict and judgment for $7,000 in this case? Or, may a citizen whose legal rights have technically been violated refuse or neglect to use the means reasonably within his power to limit and stay the course of resulting damage? If not, whence the verdict and judgment for $7,000 in this case?

May the forums of law be turned into halls for the enact-
473 ment of comedies, and by undue influence the course of justice be diverted from its channels? If not, whence the absence of disapproval of the evident results of the misleading and inflammatory address of plaintiff's able counsel to the jury as shown by the record? It is impossible to read that address, and believe that it did not unduly influence the jury.

Was not the defendant sufficiently at a disadvantage before the jury by reason of its being a corporation, without being made the special subject of vituperation as for the supposed wrong sayings or doings of others? The reported cases are numerous where courts of last resort have recognized and acknowledged the existence of such disadvantage. If that disadvantage may be increased by palpably wrongful allusions and innuendos without restraint, it is useless to expect a true verdict upon the evidence, and in such case where is the evil tendency to end?

This record may evidence the making of a persistent and determined defense to the plaintiff's suit; if so, it is believed that no apology is needed therefor. The appellant's best judgment has been and is that, under the decision of this court as heretofore rendered, it is justly liable to the plaintiff for no more than the sum which its conductor required to be paid for the plaintiff's passage on the train from which he allowed himself to be expelled.

Respectfully submitted,

GEO. WILLARD,
Attorney for Appellant.

Chicago, Sept., 1888.

474 *Appendix.*

MORAN, *P. J.*:

An action was brought by appellee in the court below to recover damages for being forcibly expelled from appellant's car by appellant's servants at a station near Philadelphia. The case was tried, and a verdict in plaintiff's favor for fifteen thousand dollars was rendered. The verdict was set aside by the trial judge, and a new trial had in which a verdict for the same amount was rendered, and judgment was entered thereon.

The case was appealed to this court and was affirmed, but on appeal to the supreme court was reversed, and remanded for a new trial. The opinion of the supreme court, which is reported in the 112 Ill., 295, contains a statement of the facts regarding appellee's purchase of a ticket, and the circumstances of his being on the train, and as the evidence on that branch of the case was in no manner changed at the last trial, we deem it sufficient to refer to said statement.

The supreme court determined that appellee was rightfully on the car from which he was expelled, and that the ticket which he tendered to the conductor was a valid ticket binding on the company, and which it was legally bound to honor, but held that when the conductor, acting under the instructions of the company, refused

to accept said ticket, and demanded that appellee pay his fare or leave the train, it was the duty of appellee to do one or the other, and when he refused to do either and was expelled from the car, he could recover no damages by a reason of the mere ejection, unless unnecessary force was used.

The last trial was conducted under the law as thus laid
475 down by the supreme court, and the jury was instructed, that when the conductor demanded that plaintiff should pay his fare or leave the train, "that it was his duty if he declined to pay his fare as requested, to leave the train, and that when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for any personal injury which he thus voluntarily brought upon himself through the use of such force as was reasonably necessary to remove him from the car."

It was an appropriate question for the jury under all the evidence, whether the force used by the servants of appellant in ejecting appellee was unjustifiably violent and excessive, and whether such injuries as he sustained during the expulsion were wantonly and maliciously inflicted. The evidence tended to show that appellee received injuries from which serious results followed, and while there is some conflict as to what was said and done by the conductor prior to and during the expulsion, we cannot say that the conclusion reached by the jury is without support in the evidence.

The verdict of $7,000 is not, in our opinion, considering all the circumstances, so large as to require us to reverse the case on the ground that there was manifest passion and prejudice on the part of the jury. There is evidence which warrants the belief that appellants received injuries permanent in their character, that illness resulted from the force used upon him which prevented him from attending to the practice of his profession as he had before done, and that loss of business and earnings ensued.

Had he left the car at the command of the conductor, he would be entitled to recover, in the language of the supreme court, "for every indignity offered," and for all "damages sustained." For the indignity of being compelled to leave the car he might
476 & 477 have damages, but not for the indignity of being forcibly ejected. In such a case, where the distinctions required by the rule as laid down by the supreme court are nice; where the rule requires one who is legally in the right to submit without resistance to the enforcement of a wrong, or, if he does resist, limits his right of recovery to damages for such excess of force only as may be used in compelling him to submit, any jury would be very likely to visit with severity any unnecessary force which they find indicated by the evidence.

The man who is rightfully on a train, and produces to the conductor conclusive evidence of his right, cannot be in a more unfavorable position as regards his claim to damages when forcibly expelled by the servants of the company, than one who is a trespasser on the car, and insists on remaining wholly without right. Yet very considerable verdicts have been sustained where excess of

force was used in removing a trespasser from the train, and injury resulted, or where he was removed from the car at an improper place, where the result was merely inconvenience.

Coleman *v.* N. Y. & N. H. R. R., 106 Mass., 160.
Holmes *v.* Wakefield, 12 Allen, 580.
Chicago & Alton R. R. *v.* Flagg, 43 Ill., 364.
Penn. R. R. Co. *v.* Vandivin, 42 Penn. St., 365.

We have examined and considered all the points urged by counsel for appellants as grounds of reversal, and we are of opinion that no error was committed in the trial of this case in the court below which warrants a reversal of the judgment.

The same will, therefore, be affirmed.

(Endorsed:) Filed Jan'y 16, 1891. Wm. H. Bradley, clerk.

478 In the Supreme Court of Illinois, Northern Grand Division, September Term, A. D. 1888.

THE PENNSYLVANIA RAILROAD COMPANY, Appellant, *vs.* WILLIAM J. CONNELL, Appellee. } Appeal from Appellate Court, First District.

Brief of Appellee.

We respectfully submit the subjoined brief to the supreme court.

SIDNEY SMITH,
W. J. HYNES,
Att'ys for Appellee

JOHN I. REDICK, *Of Counsel.*

479 In the Appellate Court of Illinois, First District, October Term, A. D. 1887.

THE PENNSYLVANIA RAILROAD COMPANY, Appellant, *vs.* WILLIAM J. CONNELL, Appellee. } Appeal from the Superior Court of Cook County.

Brief and Argument for Appellee.

This case, after having been four times tried by a jury, once affirmed by the appellate court and reversed by the supreme court, is again on its way for either a final affirmance or another reversal.

As stated by counsel for appellant (Appellant's Brief, p. 36), the evidence on the last trial is in substance the same as on the trial the proceedings of which were reviewed by the supreme court (112 Ill., p. 295). We do not deem it necessary, therefore, to
480 make an extended statement of the facts in this case, as was done in the brief of appellee on the former hearing.

This court is already familiar with the main features of the case.

The same objections urged for the reversal of the judgment for $7,000 last rendered in appellee's favor (with the exception of alleged erroneous remarks of court and counsel) were urged for the reversal of his second judgment for $15,000. No complaint is now made by appellant that the instructions contained in the present record do not correctly state the law as to the duty of appellee to again pay his fare upon demand of the conductor or leave the train. The instructions on this branch of the case are as full and as favorable to this view of the law as the able counsel for the appellant could frame them. (See instructions.)

The reasons now urged for a reversal, as we gather them from appellant's brief, may be correctly classified as follows:

(1) Revocation of the agency of the Wabash Co. to sell tickets over appellant's line of road; the right of the conductor to refuse appellee's ticket; and the duty of appellee to pay the fare demanded or leave the train.

(2) Rulings which relate to evidence.

(3) Rulings which relate to instructions.

(4) Improper language by plaintiff's counsel in the presence and hearing of the jury.

(5) Improper and erroneous statements by the court to the jury.

(6) Excessiveness of the verdict.

481 I.

Revocation of the agency of the Wabash Co. to sell tickets over appellant's line of road; the right of the conductor to refuse appellee's ticket, and the duty of appellee to pay the fare demanded or leave the train.

(A) The question as to the alleged revocation of the agency of The Wabash, St. Louis and Pacific Railway Company was so thoroughly discussed in the briefs of appellant and appellee on the former appeal, and was so fully settled by the decision of the supreme court, that we now deem it necessary only to cite said decision (112 Ill., p. 295), and to quote therefrom the following:

"Where a coupon ticket has been sold, as here, the rights of the passenger and the duty and responsibility of the several companies over which the passenger has procured a passage are the same as they would have been if the passenger had purchased a ticket at the office of each company constituting the through line."

(B) If counsel for appellant accepts the decision of the supreme court already made in this case, we do not see how he can well claim that the conductor had a legal right to refuse appellee's ticket and require him again to pay fare. This claim, although pretended to be made, is not consistently urged. It is even admitted in appellant's brief (p. 7 and 9) that the supreme court has held that "the ticket was a valid one and entitled plaintiff to passage," and that "under the decision of the supreme court, and the issue made by the pleadings, the plaintiff had a right of recovery." If, then,

the ticket was valid, and if by reason of said ticket, which
482 had been properly tendered to the conductor, the plaintiff was entitled to passage, and if under the decision of the supreme court and the issue made by the pleadings, the plaintiff had a right of recovery, by what process of reasoning does counsel for appellant reach the conclusion that the conductor had the legal right to refuse plaintiff's ticket and require him to again pay fare?

It may be as claimed in appellant's brief (page 10) that the conductor was in duty bound, as an employé, to obey the instructions of appellant. If, therefore, he had been instructed to "thump" every passenger who happened to have red hair, or, as was the fact in this case, to "bounce" every passenger who might be guilty of riding over the B. & O. railroad, it would, of course, be his duty, as an employé, to so "thump" or "bounce" the offending passenger; but would he have the legal right so to do? Clearly he would not. The decision of the supreme court does not go to this extent.

(C) As to the duty of appellee, when notified by the conductor that he could not receive his ticket, either to again pay fare or leave the train, no question can be raised upon this appeal which will be of any avail to appellant. As the record will show all instructions given, and the whole trial of the case, were on the theory that such was the duty of appellee. While, in the language of Judge Wilson of the appellate court (C. & N. W. R. *vs.* Bannerman, 15 Brad.) we find it "difficult to yield assent to the doctrine that where a passenger presents to the conductor a ticket which has been duly issued to him by the company's authorized agent, upon the payment of full fare, and which entitles him to be carried over the company's road, it is the duty of such passenger when notified by the
483 conductor that he would not receive the ticket to pay his fare under protest, or leave the train;" nevertheless, we also believe, like Judge Wilson, that such doctrine "must be accepted as of binding authority, coming as it does from the court of last resort."

Such was the doctrine applied with the utmost rigor upon the last trial of this cause, as will be observed by the numerous instructions given at the request of appellant.

II.

Rulings Which Relate to Evidence.

As the record in this case will show, appellant has little to complain of, so far as the rulings which relate to evidence are concerned. The claim that any error was committed to the prejudice of appellant has little foundation. The two alleged errors attempted to be specially pointed out, are perhaps as serious as any to be found in upwards of 130 pages of the printed record of testimony, but even these are scarcely worth a passing notice.

A question is asked the rate-division clerk in the passenger department of appellant's railroad as to the way the Baltimore &

Ohio Company would or might "protect." As stated by the court, this was simply calling for the judgment of the witness as to the meaning of a statement made by an outside third party to one of appellant's agents. That this was incompetent, as well as utterly immaterial, needs no citation of authorities.

Another question is asked one of appellant's medical ex-
484 perts as to whether he was one of the gentlemen who treated the "bomb-struck policemen"? Although an objection was interposed, the record shows that the question was answered, the witness claiming in his answer to have had the usual experience of a surgeon in active practice. The point of asking the question would appear to be other than as claimed in appellant's brief, viz: to show the experience, and therefore the competency of the witness as a physician and surgeon. This had already been done at considerable length (Abstract, p. 117), and the witness had testified not only that his occupation was physician and surgeon, and had been such since 1862, but that he was a graduate of the College of Surgeons in Dublin, Ireland, and had a certificate from the State board of health, and was surgeon of the county hospital and had been connected with that institution for seven or eight years. Surely with such a pedigree as this, it could not be a matter of much importance as to whether or not he was one of the gentlemen who treated the "bomb-struck policemen."

III.

Rulings Which Relate to Instructions.

We submit that the instructions given on behalf of plaintiff were proper, and all come fully within the rule laid down by the Supreme Court in its former decision in this case.

We also submit that the instructions of appellant, modified or refused, were properly modified or refused. So far as the instructions refused involved any correct principle of law, the same will be found fully and fairly stated in other instructions which
485 were given. To adopt the language of the court in one of its criticisms of a brief of counsel for appellant (101 Ill., 109), "The objections urged are, in our opinion, hypercritical for the most part, and all untenable. They are not of sufficient practical importance, in our opinion, to justify stating and answering them seriatim and at length, and we shall, therefore, forbear further comment."

IV.

As to Alleged Unjust and Improper Language by Plaintiff's Counsel in the Presence and Hearing of the Jury.

The abstract contains all, and appellant's brief contains a goodly portion of the argument to the jury made by one of appellee's counsel.

Modesty alone forbids our urging a most careful reading and meditative consideration of that argument. That it contains any

statement that would call for a reversal of the judgment rendered in appellee's favor is not sustained by any of the cases cited in appellant's brief. We refer to the several cases cited in appellant's brief and quote from the Illinios cases as follows:

Felix *vs.* Scharnweber (Ill.), 10 Northeastern Reporter, 16:

"The third and last ground of error insisted upon is that counsel for plaintiff in his closing argument to the jury commented on the fact that his client was a poor man and the defendant was a man of wealth and leisure traveling in Europe. Undoubtedly this was very objectionable conduct on the part of counsel, but, on objection being made, the court sustained the same, and remarked that such considerations should not be regarded by the jury. While
486 this court does not wish to be understood as approving the conduct of counsel, it can hardly be said, even under the strictest rules recognized by any of the cases on this subject, that which is alleged against him is of sufficient gravity to warrant the reversal of the judgment, and especially in view of the fact that the court at once advised the jury such considerations should not be regarded."

Bennett *vs.* Glatfeldt (Ill.), 11 Northwestern Reporter, 250:

"The final reason alleged for reversal of the judgment is the alleged misconduct of a juror in consorting with the plaintiff during the trial of this cause. * * * While what took place here meets with our strong disapprobation, we hardly feel that we should go so far as to visit it with the penalty of a reversal of the judgment."

Henry *vs.* Railroad Co. (Ill.), 12 Northeastern Reporter, 745:

"The last objection is that the counsel for the railroad company was permitted to make improper remarks to the jury over appellant's objections. The most objectionable remarks were these: "This railroad will benefit the public, and each of us, if built. If you fix these damages too high, the company will not pay them and the road will not be built. We will never get railroads if they have to pay such damages for right of way." Where the language of counsel tends to excite passion and prejudice to a degree that will probably cloud the judgment, and therefore improperly affect the verdict to be rendered, it should be promptly checked by the court at the time and the counsel rebuked; and for a failure in this regard a verdict in behalf of the party whose counsel thus abuses his position should be set aside; but it is not to be assumed that every misstatement of law, or of fact, will have the effect of exciting improper prejudices. The instructions of the court and the good sense of a competent jury, is a sufficient protection against ordinary errors of statement and false arguments of counsel. We find nothing in this record to induce us to believe (the jury having been correctly instructed as to the law) that they were excited by these remarks to act in a way they would not otherwise have acted." See also Chicago & A. R. Co. *vs.* Johnson (Ill.), 4 Northeastern R., 381.

487

V.

Improper and Erroneous Statements by the Court to the Jury.

It is urged with some degree of persistency that the remarks made by the judge in the presence of the jury, in the absence of counsel on both sides, had some improper influence on the jury, whereby appellant was in some manner prejudiced.

A full statement of what occured is certified to by the judge. We submit that whether tested by the statement referred to, or by the affidavits sought to be filed, nothing occurred or was said in the presence of the jury which could possibly be construed as improper or erroneous.

For some reason, not explained, one of the jurors, according to one of the affidavits, was "considerably set in his views and would not agree." So set in his views was he, that a brother juror wished "to know if it was the law that a juryman had a right to close his mouth and refuse to discuss the evidence with his fellow-jurymen, or give any reason why he would not agree with them."

We submit that in view of the situation, the judge acted with great discretion and wisdom, and that his remarks were very appropriate and proper. The fact that the eleven jurors came down to $7,000 to satisfy one "who would not agree, or give any reason why he would not agree," in place of that one going up to $15,000, as twenty-four jurors had previously done, is pretty good evidence that appellant was not prejudiced by the remarks of the judge.

488 Counsel for appellant, however, claims that it is not necessary that the judge's conversation or interview for the purpose of ascertaining if the jury had agreed upon a verdict, should be prejudicial, in order to entitle appellant to a reversal.

The cases cited do not sustain him in the claim that a reversal should be had by reason of anything which transpired between the judge and the jury. See Chicago & E. I. R. Co. *vs.* Holland (Ill.) 13 Northeastern R., 145.

VI.

As to the Alleged Excessiveness of the Verdict.

The objections of appellant would be incomplete without a claim that the verdict was excessive. Notwithstanding two juries have rendered verdicts in favor of appellee, each for $15,000, and although the appellate court, upon a record of evidence declared in appellant's brief to be in substance the same as shown by the present abstract, approved and affirmed the award of damages in appellee's favor for $15,000, it is now pretended to be claimed that the verdict for $7,000 is excessive. Counsel for appellant is generous to concede that a right of recovery exists to the extent of $3.25 (Appellant's Brief, p. 9). Of course, any recovery in excess of this sum, according to his views, would be excessive. The theory of counsel for appellant as urged in his brief (p. 15) is that appellee was bound "to accept the conductor's offer to receive a money fare for $3.25, and thus prevent all other resulting damages." In other words, it

seems to be claimed that under the decision of the supreme
489 court, as made in this case, a passenger who has once paid his fare and is possessed of a proper ticket as evidence of his right of passage, for simply refusing to again pay fare or leave the train may not only be "bounced" from the car, but as the result of unnecessary and excessive force be seriously and permanently injured, and his right of recovery is limited to the sum paid for his ticket. We do not so understand the decision of the supreme court.

As we view the decision made, it is to the effect that it was the duty of appellee, when required to pay his fare, to pay the same or leave the train, and failing to do this, he could not recover for the use of such force as was necessary and proper to expel him, but that he might recover for injuries resulting from the use of unnecessary or excessive force. In giving the right to a conductor to "bounce" passengers for refusing to pay fare a second time, it would seem reasonable to limit such right to the use of force necessary and proper for such purpose. We use the word "bounce" in this connection for the reason that the undisputed testimony, both in the former as well as present record, shows that the conductor Wilson said to the appellee before ejecting him from the train, "Now, sir; you pay your fare or I'll bounce you from this train." This was said by the conductor in a vindictive manner and with his fists doubled.

As the record shows, two verdicts have been previously returned in this case, each for the sum of $15,000.00. The verdict last returned, which was for $7,000.00, in place of being excessive, was grossly inadequate. In view of the nature of this case and the loss and injury sustained by appellee, the third verdict, like the two preceeding ones, should have been for at least the sum of $15,000.00.

Had it been, there is not a doubt but that it would have been
490 considered reasonable and would have been affirmed by this court. In fact this question, so far as the appellate court is concerned, may be regarded as *res adjudicata*. If upon a second verdict for $15,000.00 the judgment was affirmed, it surely would be on a third verdict for a like amount.

Concerning the effect of three verdicts, Mr. Justice Walker, in delivering the opinion of the court in Silsbe *vs.* Lucas, 53 Ill., 481, says:

"It would seem to be eminently proper, where three juries have found the facts the same way, that there should be an end to the controversy as to what the facts are. The law having constituted the jury the judges of the facts, and only invested the judge with power to set aside the verdict when it is in his mind against the evidence, and when the persons authorized to find the facts have three times determined them the same way, the supervising power of the judge should cease, and the facts thus formed should be conclusive."

Appellee's brief on the former hearing of this case contained an extended reference to the facts authorizing a large assessment of damages, and also contained a very full citation of authorities in support of his verdict for $15,000. We do not consider it necessary

to again make reference to such facts or to again cite the cases which support, under such facts, a verdict two or three times larger than the one now under consideration. The decision of the supreme court that it was the duty of appellee to pay fare or leave the train upon demand of the conductor cannot affect or prejudice his right of recovery, provided the personal injuries he sustained *was* the result of excessive or unnecessary force. The argument of counsel for appellant proceeds on the theory that no more force was used than was necessary, and that the supreme court had so determined, and in support of this position quotes from the opinion (see Ap-
491 pellant's Brief, p. 37) the following: "It did not appear that more force was used than was necessary."

Now, in the first place, we submit that the question as to whether or not more force was used than was necessary is purely a question of fact, and is for the jury and not the supreme court to determine. In the second place, the supreme court, in place of desiring to pass upon this question, endeavored to exclude it entirely from the opinion last filed. In appellee's motion for a rehearing, objection was made to several expressions of the court, which were as follows: "There is no evidence in the record, so far as we have been able to discover, that the conductor acted wantonly or maliciously." "Had the expulsion been malicious, or had more force been used than was necessary, or had appellee been expelled in a rough, brutal manner, a different question would be presented, but such is not the case."

It being claimed by appellee, in his motion for a rehearing that the evidence in the record did show that the conductor acted wantonly and maliciously, and that the expulsion was malicious, and that more force had been used than was necessary, and that appellee had been expelled in a rough and brutal manner, the objectionable portions of the opinion were stricken out. (See opinion as first published in Chicago Legal News, and as finally published in 112 Ill.)

By inadvertence, the expression "It did not appear that more force was used than was necessary," was not specially noticed in appellee's motion for a rehearing, and therefore it was not stricken out of the corrected opinion, as undoubtedly would have been done had it been so noticed.

492 *Cross-errors Assigned by Appellee.*

There is one ruling of the trial court in this case which has taken from the appellee a substantial and valuable right. Satisfied at the time it was made that the ruling was equally a grave injustice to their client and a serious error touching an important law of practice, a subsequent painstaking examination of the question involved has convinced appellee's counsel of the correctness of their position beyond all possibility of doubt.

The appellee is not now seeking a reversal of the last judgment entered in his cause. Wearied "with the law's delays," he is willing to abide by this the last, and by the one-half part the least, of three verdicts in his favor rather than encounter the expense of time,

money and strength required to fight over again for the fourth time the same battle. But if the cause, by reason of any error committed in his favor, is to be remanded for another trial, he asks that the error committed against him, also be corrected by the decision of this court. Without this correction, as will appear later in the examination of this question, there is every probability that he will again be denied his lawful right.

The error charged relates to an important rule of practice of frequent use. It arises under the following conditions:

The plaintiff alleges as his cause of action against the defendant a "violent and abusive assault," "without just cause or provocation;" that the assault was made with "great and unnecessary
493 force," and with "unnecessary and reckless violence and indignity," and that the assault was "wilful, wrongful and malicious." The declaration further alleges that this assault was committed upon him while he was a passenger on defendant's train; that as such passenger he had paid his fare; that it was the "defendant's duty to carry him safely on his specified journey." (Rec., 7, 9, 23, 25.)

Prior to entering upon the last trial of the case, the defendant withdrew the general issue upon which the two previous trials had been had, and rested its defense upon two special pleas.

The first of these pleas argumentatively denied that the plaintiff had paid his fare, and justified the assault, alleging also that the "defendant did no unnecessary damage on that occasion." This plea was unquestionably bad on its face, as it did not set up facts which would in law justify the assault. (Rec., 60.)

The second plea was a formal plea of *son assault demense.*

Upon this state of the pleadings, at the proper stages of the trial, the plaintiff made formal motions for the right to begin the evidence and to open and close the argument. These motions were denied and the rights thus sought were, on defendant's motions, given to the latter. (Rec., 95 and 96.)

With reference to this ruling we insist upon three propositions, upon which we ask the decision of this court.

494 I.

The rights in controversy were substantial rights belonging to one party or the other by law, and it does not lie in the discretion of any trial court to grant or withhold them at pleasure.

C., B. & Q. *vs.* Bryan (90 Ill., 126).
Tobin *vs.* Jenkins (29 Ark., 151).
Johnson *vs.* Josephs (75 Me., 544).
Cunningham *vs.* Gallagher (61 Wis., 170).
Perhyn Slate Co. *vs.* Meyer (8 Daly, 61).
Colwell *vs.* Brower (75 Ill., 516).
Millard *vs.* Thorne (56 N. Y., 402).
Sanders *vs.* Bridges (2 S. W. Rep., Texas, 663).

It will be noticed in the close examination of some of the cases cited here and elsewhere, that some States have provisions in their statutes regulating this right, but as those provisions are simply declaratory of the common law they do not impair the general authority of the cases. For example: The Ohio Code provides—That the party who would be defeated if no evidence were offered, on either side, must first produce his evidence. It is true that the supreme court of this State in Carpenter *vs.* First National Bank (10 N. E. Rep., 18) intimates that it considers that it lies largely in the discretion of the trial court to give the opening and close of the case where that court deems most expedient for the proper administration of justice. It cites as its only authority for that view a part of a sentence in Greenleaf on Evidence. We quote the entire sentence:

"In this country it is generally deemed a matter of discre-
495 tion, to be ordered by the judge at the trial as he may think most conducive to the administration of justice; but the weight of authority as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff wherever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone." (1 Gr. Ev., sec. 76.)

As to this discretion in the court, Greenleaf does not cite a single case in which a higher court has rendered any decision supporting the text. Nor can any such decision be found by an examination of the cases reported. But an examination of the English cases cited by him in support of the last half of the quoted sentence does show that the *nisi prius* judge was accustomed to examine into the cause on trial for the purpose of ascertaining where the real affirmative lay without regard to the state of pleadings, and whether the plaintiff sought substantial or only nominal damages. But when these questions were determined there is no intimation that the *nisi prius* judge was allowed to exercise any discretion in the premises. According to the long-established practice the trial udge may exercise his discretion in finding out where the right to open and close lies, but not in conferring it. It is not a thing to be given, but a right to be determined.

II.

In all cases where the affirmative of any traversable allegation is with the plaintiff, he has the right to open and close.

To wrest this vantage ground from the plaintiff, the law is that the defendant must admit all. For example, where the plaintiff alleges a purchase of corn, payment, failure of defendant to
496 deliver the quantity of corn, and that it was worth $1.25 per bushel, and the defendant admitted every allegation except that naming a value, the court held that it was error to permit the defendant to open and close.

Sanders *vs.* Bridges, *supra.*

But this proposition is so closely allied with the third which we submit, that they can be advantageously taken together.

III.

In any case where the damages sought are substantial and unliquidated, the plaintiff has the right to open and close, notwithstanding the defendant's only pleas are in justification.

This rule naturally grows out of the preceding one, inasmuch as against an action for unliquated damages there are some substantial allegations which the defendant cannot admit without confessing judgment for all the plaintiff may have claimed.

The position apparently occupied by the supreme court of this State, as will be seen hereinafter, is such that we feel justified in entering into a somewhat detailed examination of the law involved.

The history of the decisions is this:

In the earliest practice shown in the reports, the plaintiff was always allowed to begin. This always has been the fundamental and general rule. Any deviation from it is an exception, though not necessarily wrong. Next in order, it is observed that for convenience, and especially for the sake of shortening trials by dispensing with the introduction of evidence rendered incompetent by the new issues made in the progress of the pleadings, the defend-
497 ant was allowed to begin. As, for example, when the plaintiff sued on a long account, and the defendant admitted the whole account and only pleaded payment of it.

But the defendant was allowed to begin only where the following conditions obtained:

(*A*) Where there was no controversy as to the damages, they being either nominal or ascertainable by computation based on the admitted facts.

(*B*) Where the defendant's pleas consisted wholly of new and purely affirmative matter, and contained no traverse of any of the plaintiff's allegations.

Of this last class of cases were—

Hodges *vs.* Holden, 3 Camp., 366.

Jackson *vs.* Hesketh, 2 Stark., 581.

The Conflict of Authorities.

Carrying the examination back of the syllabi of cases in the digest and the language of text books and notes, a careful inspection of the decisions shows that the conflict of authorities has been more apparent than real.

While the law regarding the rule in question was uniform as above given, the case of Bedell *vs.* Russell (R. and M., 293) came up for decision on this point before Justice Best. This was an action for battery, with a plea of justification. The judge, as he says, thinking he was bound so to do by the authority of the cases of Hodges *vs.* Holden and Jackson *vs.* Hesketh (*supra*), against his own convictions regarding the law, decided the defendant should begin.

In the former cases the damages were not in controversy.
498 In this case they were. Therefore this decision was an innovation on the previous practice. It was soon followed by like decisions in—

Fish *vs.* Travers (3 Carr & P., 578).
Cotton *vs.* James (3 Carr & P., 505).
Cooper *vs.* Wakley (3 Carr & P., 474).

In Cotton *vs.* James there was the same surrender of individual opinion to supposed authority by the judge, as was noted in Bedell *vs.* Russell.

Simultaneously with these decisions other judges in a larger number of cases adhered to the old rule, as in

Morris *vs.* Lotan (1 M. & Rob., 238).
Wood *vs.* Pringle (*id.*, 277).

The most conspicuous of these innovating decisions was that in Cooper *vs.* Wakley (*supra*), which was an action for libel with truth pleaded in justification. The feeling that this decision was a serious error was so general and so strong, that shortly after it had been promulgated all the judges met in consultation, and after a full discussion of the question signed the following resolution:

"In actions for slander, libel and injuries to the person the plaintiff shall begin, although the affirmative issue is on the defendant."

Of this resolution, Lord Denman, one of the signers, says: "If ever a decision was overruled on great deliberation, and by an undeviating practice afterwards, it is that in Cooper *vs.* Wakley." And he further says that the resolution was not to establish a new rule for convenience, but was declaratory of the law already established.

Mercer *vs.* Whall (5 Ad. & El., 447).

This case also extended the same rule to actions *ex contractu* where unliquidated damages were sought.

499 That is the beginning and the end of the real conflict of authorities. It was confined to the English courts and to a few cases. It extended over a brief period of time, and was fully ended fifty years ago.

The apparent conflict of authorities arises from a failure to note in the cases coming under the exception to the rule the small but material point which turns the decision. A most conspicuous example of this apparent conflict is found in the Indiana courts. In McCoy *vs.* McCoy (106 Ind., 492), which was an action for slander with solely a plea in mitigation of damages, the opening and close was given to the defendant. While in Shuelse *vs.* McWilliams (104 Ind., 512), also an action for slander with no general issue, the opening and close was decided to be with the plaintiff. But in the former case there was a complete confession of all the plaintiff's allegations, and in the latter there was an inferential denial of part of the plaintiff's allegations, and attention to the distinction between the two in this regard was specially called. The law of Indiana is stated in

Felters *vs.* Muncie Bank (34 Ind., 25).

This was an action on a note, the defendant admitting all allegations except that the attorney's fees were worth $200. The decision is "that wherever the plaintiff has any proof to make either as to the facts necessary to make out his case, or as to the amount of damages which he ought to recover, he has a right to open and close."

This case is followed in

Heilman *vs.* Shanklin (60 Ind., 424).
Hyatt *vs.* Clements (65 Ind., 12).

In the latter case the defendant unsuccessfully sought to gain his point by admitting the attorney's fees to be worth a reasonable per cent. of the amount of the note.

500 And the same court says that the opening and close is with the plaintiff "where he is required to prove his damages in cases where the damages cannot be ascertained by mere computation."

Cox *vs.* McVickars (35 Ind., 27).
Baltimore R'y *vs.* McWhinney (36 Ind., 436).

The Law of the Case Outside of Illinois.

The English resolution gave the right to the plaintiff to begin in the actions specified, not arbitrarily, but in accordance with the law that he who affirms shall prove. They considered that in "actions for libel, slander, and injuries to the person" properly declared on, the defendant could not in good faith admit all the plaintiff's material allegations and still have a defense to his claim. Any attempt to defend after admitting all that he should admit would be simply an exercise of ingenuity to defeat the spirit of the law by the use of its technicalities. They simply decided that all such attempts had been nugatory in the past and would be, from the necessities of the case, unavailing in the future. The decisions in this country have demonstrated the soundness of this provision. For without the binding authority of the English resolution to cut off these attempts, they have been made in nearly every State and in some repeatedly. But whenever they have been fairly brought to the test of the universally adopted rule of practice, "He who affirms shall prove," in every case in which the plaintiff has properly declared his injuries, they have uniformly failed.

The law which prevails in all the States is stated in the following cases, to which we ask attention:

501 Dille *vs.* Lovell (37 Ohio St., 415). Assault and battery.

"It was an action for unliquidated damages with pleas in justification, which were put in issue by the reply. Upon such issues both reason and the weight of authority is that the plaintiff should begin and close."

Johnson *vs.* Joseph (75 Me., 544). Assault and battery. Plea *son assault de mesne*. Replication *de injuria*.

"*Son assault* is but a qualified admission of the injury alleged. * * * In fact the defendant cautiously worded his plea to avoid

admitting the whole injury charged. He says he did unavoidably a little beat, bruise and ill treat the said plaintiff. One of the issues of the case then was whether the beating was little or much."

Buckhalter *vs.* Coward (16 S. C., 435) (1881). Action for libel. Plea admitting all allegations except malice, and denying that. The opening and close given to the plaintiff, for the reason that the failure to admit the malice was to that extent pleading both general issue and justification.

In addition to the above cases, we cite:

To the point that the plaintiff is entitled to begin when he has affirmative of any issue:

Chesley *vs.* Chesley (37 N. H., 229).
Huntington *vs.* Conkey (33 Barb., 218).
Opdyke *vs.* Weed (18 Abb. Pr., 223).
Johnson *vs.* Maxwell (87 N. C., 18).
Bertrand *vs.* Taylor (32 Ark., 470).
Jackson *vs.* Pittsford (8 Bl'kf'd, 194).

To the point that he has the right to begin in cases of unliquidated damages:

Young *vs.* Highland (9 Gratt., 16).
Cunningham *vs.* Gallagher (61 Wis., 70).
Dago *vs.* Whisner (31 Ohio, 192).

502 *The Law as it Stands in Illinois.*

In Illinois the law touching this precise question has not been fully discussed nor clearly determined. The decisions affecting it are in the following order:

Harvey *vs.* Ellithorpe (26 Ill., 418).
Huddle *vs.* Martin (54 Ill., 258).
Kells *vs.* Davis (57 Ill., 261).
Colwell *vs.* Brower (75 Ill., 523).
C., B. & Q. *vs.* Bryan (90 Ill., 126).

In all of these cases the right to open and close was adjudged to the defendant. In them no authorities are cited, excepting that the 57th Ill. case cites the 26th; and the 90th cites the 26th and the 57th; nor do the decisions contain any full discussion of the question such as is had in other States. The inference is very strong that the supreme court of this State has never had occasion to fully examine and determine the law in this regard.

In Harvey *vs.* Ellithorpe, the decision was clearly in line of all the authorities, the only issue presented being that of usury on a note.

Huddle *vs.* Martin was in the same line, the only issue being the payment of an account.

Colwell *vs.* Brower was an action in replevin where nothing was denied which the plaintiff alleged, and the only issues were upon the new matter set up by the defendant's pleas.

In none of these three cases did the defendant traverse directly or indirectly any of the plaintiff's allegations.

But the cases of Kells *vs.* Davis and C., B. & Q. R'y *vs.* Bryan present some difficulties. They are in apparent conflict with
503 the whole line of authorities since Mercer *vs.* Wall, in this country and in England. They are both cases of assault and battery with issues joined on special pleas in justification, and in both cases the right to open and close was given to the defendant. All uncertainty as to the effect of these decisions would be removed had the pleadings been fully given in the opinions.

In considering them we will make two assumptions, one of which must be true.

First, we assume that the plaintiff in his declaration made a full statement of all his causes of recovery, and alleged great force and violence, or malicious force, or unnecessary force; and that the defendant did not admit such allegations. If this be true, then we submit that the decisions are not sustained by the authority cited in either case, and that they are contrary to the law. Harvey *vs.* Ellithorpe was no more authority for such decisions than was Hodges *vs.* Holden for Beddell *vs.* Russell, and the same error was made here as there, to wit: the extending of the rule to cover cases not within its reason.

But, secondly, we assume that every allegation of the declaration was confessed; that the declarations in those cases contained no averments claiming unliquidated damages; that the affirmative of no single issue, not even the extent of injuries caused or damages incurred, was on the plaintiff. Under this assumption the decisions in these two cases were in harmony with the law, the case cited was authority for the position taken, and the effect of a plea of *son assault demesne*, in an action for personal injuries well pleaded, upon the question of the right to open and close is still to be passed upon by the Illinois supreme court.

Rather than believe that the supreme court of this State
504 has made such a serious error in such a plain case, as it would be to hold that the plea of *son assault demesne* standing alone always gives the opening and close to the defendant—the exact reverse of the present rule in all other courts, English and American—we adopt the last of the above assumptions and assert that there must have been some defect in the declaration not shown in the opinion, which justified the decisions.

Application of the Law to this Case.

The declaration contains these allegations:

(1.) That appellee had paid his fare. (Rec., 7.)

(2.) That at the time of the assault he was conducting himself in all respects in a lawful, peaceful and orderly manner. (Rec., 9.)

(3.) That appellee was violently and abusively assaulted by appellant. (Rec., 9.)

(4.) That appellant assaulted appellee with great and unnecessary force, and with unnecessary and reckless violence and indignity. (Rec., 23.)

(5.) That appellant's assault was willful, wrongful and malicious. (Rec., 25.)

In these allegations lies the great bulk of appellee's grievance. They state the only substantial things for which he brings his action. But they are neither confessed by the special pleas, nor even admitted by appellant's silence.

505 *Appellant's First Special Plea.*

It states that appellant did no unnecessary damage on that occasion. (Rec., 60.)

It states argumentatively that appellee had not paid his fare. Such is the legal effect of all the matter in the plea relative to tickets.

It thus traversed the first four of the above allegations.

Appellant's Second Special Plea.

This was a formal plea of *son assault demesne*. It traversed the second of the above-specified allegations, by setting up a first assault by the plaintiff.

By reason of these traverses in both pleas the affirmative of all the substantial allegations of the declaration rested on the plaintiff.

Sham Pleas.

There is still another ground upon which the appellee was entitled to his right of opening and closing the argument, even had the pleas been free from the objections pointed out. The defendant cannot gain this right in any case without introducing evidence in support of his plea.

Young *vs.* Hayden (3 Dana, 145).

Van Taut *vs.* Jones (3 Dana, 464).

There was no pretense of evidence that appellee began the personal encounter—that appellant's assault was in self-defense. The whole proceeding of withdrawing the general issue and filing these two pleas was a trick—a species of legal legerdemain—by
506 which in an earlier age unskilful litigants were frequently robbed of just rights. The farcical nature of the operation is clearly demonstrated in this cause, because with three trials, two under the general issue and one under the special pleas, the evidence is precisely the same in all. No new matter was introduced; no new issues formed by these so-called affirmative pleas. It only affords an opportunity for this court to suppress another relic of barbarism, and remove another obstacle in the path of justice.

Our supreme court says that the opening and close belong to whichever party would suffer defeat were no evidence introduced on either side. The appellants claim that were no evidence introduced under these pleadings they would have suffered defeat—to the extent of $3.25—and therefore they came under the benefits of

the rule. It is not a matter of conjecture or argument, but a fact demonstrated in this cause that without the introduction of any evidence on either side the appellee would have suffered defeat on the first and second trials to the extent of $14,996.75, and on this last trial he would have been defeated to the extent of $6,996.75.

It is a familiar maxim that the law does not regard trifles—*de minimis lex non curat.* We submit that in a case like this, to call a judgment for $3.25 a defeat of the defendant is such a palpable disregard of the substance—such an absurd exalting of the shadow—as to be equally at variance with law and with common sense.

507 In conclusion, we submit that the record in this case fails to show any error which entitles appellant to a reversal of the judgment last rendered in this case. On the contrary, it does show error which would be available to appellee were the same insisted upon.

As previously stated, we ask for the reasons given that the judgment be affirmed, or in the event of being reversed, that the right of opening and closing the argument to the jury be allowed, as by right, justice, law and reason it should be, to appellee, upon whom rests the burden of establishing his right to any substantial recovery.

SIDNEY SMITH,
W. J. HYNES,
Attorneys for Appellee.

JOHN I. REDICK, *Of Counsel.*

(Endorsed:) Filed Jan'y 16, 1891. Wm. H. Bradley, clerk.

508 Afterward, to wit, on the twenty-sixth day of February, 1891, in the December term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *vs.* CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

In the matter of the intervening petition of the Pennsylvania Railroad Company.

Now come the parties, by their solicitors, and this cause now comes on to be heard upon pleadings and proofs, and after hearing the arguments of counsel the court takes the same under advisement.

509 Afterward, to wit, on the fifteenth day of April, in the adjourned March term of said court, 1891, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} In Chancery.

In the matter of the intervening petitions of the Pennsylvania Railroad Company.

The court having considered the matters presented herein on the hearing of said intervening petitions and being fully advised thereupon, it is ordered that said petitions be dismissed, without prejudice, at the cost of the petitioner; whereupon said petitioner prays an appeal to the Supreme Court of the United States, which is allowed upon filing an appeal bond herein in the penal sum of five hundred dollars, with surety to be approved by the court.

510 Afterward, to wit, on the twenty-fourth day of April, 1891, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, as principal, and George Willard, are held and firmly bound unto the Wabash, St. Louis & Pacific Railway Company, a corporation of the State of Illinois, in the full and just sum of five hundred dollars, to be paid to the said Wabash, St. Louis & Pacific Railroad Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventeenth day of April, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between The Wabash, St. Louis & Pacific Railway Company against The Central Trust Co., wherein the said Pennsylvania Railroad Company was an intervening petitioner, a decree was rendered
511 against the said Pennsylvania Railroad Company and its said petition dismissed without prejudice, and the said Pennsylvania Railroad Company having prayed an appeal in said court to reverse the said decree in the aforesaid suit, and a citation, directed to the said Wabash, St. Louis & Pacific Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of May next:

Now, the condition of the above obligation is such that if the said

Pennsylvania Railroad Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] THE PENNSYLVANIA RAILROAD COMPANY,
By I. N. DU BARRY, *Vice-President.* [SEAL.]
Attest: J. C. SIMS, *Secretary.* [SEAL.]
GEORGE WILLARD. [SEAL.]

Approved by—
W. Q. GRESHAM,
Circuit Judge.

(Endorsed:) Filed April 24, 1891. Wm. H. Bradley, clerk.

512 NORTHERN DISTRICT OF ILLINOIS, }
Northern Division. }

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the ancillary bill, the ancillary cross-bill, and the amended cross-bill, filed in said court May 28, 1884, June 13, 1884, and October 20, 1884, respectively, and of the orders entered of record in said court May 28, 1884, June 13, 1884, July 28, 1884, October 20, 1884, December 13, 1884, January 21, 1885, January 30, 1885, February 3, 1885, February 14, 1885, February 25, 1885, February 26, 1885, March 3, 1885, March 25, 1885, August 3, 1885, January 22, 1886, April 23, 1886, May 6, 1886, July 7, 1886, July 22, 1886, December 7, 1886, December 31, 1886, June 16, 1887, June 17, 1887, and June 18, 1887, respectively, and of all the proceedings had in said court in the matter of the intervening petition of the Pennsylvania Railroad Company in the cause wherein The Wabash, St. Louis and Pacific Railway Company is complainant and The Central Trust Company of New York *et al.* are defendants, as the same appear from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 6th day of May, 1891.
WM. H. BRADLEY, *Clerk.*

513 UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

To the Wabash, St. Louis and Pacific Railway Company and Solon Humphreys and Thomas E. Tutt, as receivers of said company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of May, A. D. 1891, pursuant to an order allowing an appeal from a decree entered of record in the circuit court of the United States for the northern district of Illinois, wherein The Wabash, St. Louis and Pacific Railway Company *et al.* are complainants and The Central Trust Company of New York *et al.* are defendants, to show cause, if any there be, why the decree mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, judge, this 16th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

W. Q. GRESHAM.

Copy of foregoing received this 4th day of May, 1891.

THE WABASH, ST. LOUIS & PACIFIC
RAILWAY COMPANY AND
SOLON HUMPHREYS AND
THOMAS E. TUTT, *Receivers*,
By WELLS H. BLODGETT, *Solicitor*,
By WILLIAM H. LEE.

[Endorsed:] Supreme Court of the United States. Wabash, St. Louis and Pacific Railway Company *vs.* Central Trust Company of New York *et al.* Citation to October term, A. D. 1890. In the matter of the intervening petition of the Pennsylvania Railroad Company.

Endorsed on cover: Case No. 14,634. N. Illinois C. C. U. S. No. 158. The Pennsylvania Railroad Company, appellant, *vs.* The Wabash, St. Louis & Pacific Railway Company & Solon Humphreys & Thomas E. Tutt, receivers of said company. Filed May 11, 1891.

157-225

Office Supreme Court, U.S.
FILED.
OCT 1 1894
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 158.

The Pennsylvania Railroad Company, *Appellant*,

vs.

The Wabash, St. Louis & Pacific Railway Co., and Solon Humphreys and Thomas E. Tutt, Receivers of said Company, *Appellees.*

Appeal from the Circuit Court of the United States for the Northern District of Ills.

BRIEF FOR APPELLANT.

GEO. WILLARD,
SOLICITOR FOR APPELLANT.

BARNARD & HORNSTEIN, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

October Term, 1894.

No. 158.

The Pennsylvania Railroad Company, *Appellant,*

vs.

The Wabash, St. Louis & Pacific Railway Co., and Solon Humphreys and Thomas E. Tutt, Receivers of said Company, *Appellees.*

Appeal from the Circuit Court of the United States for the Northern District of Ills.

BRIEF FOR APPELLANT.

General Statement.

This is an appeal from a decree entered April 15, 1891, dismissing original and supplemental intervening petitions filed by appellant in the suit of Wabash, St. Louis and Pacific Railway Company, complainant, against the Central Trust Company of New York *et al.*, defendants.

Briefly stated, the case was this: Appellant had a claim against appellee, Wabash Company, for repayment of various sums of money aggregating about $15,000 paid by appellant in defense of a certain suit brought against it by one Connell for damages on account of a refusal by one of appellant's conductors to honor, contrary to appel-

lant's general instructions, a certain ticket presented by Connell for passage over appellant's line, Philadelphia to New York; said ticket having been sold to said Connell by said Wabash Company without notice to appellant and contrary to appellant's general order to the Wabash Company, which order the Wabash Company promised to obey, but afterwards secretly disobeyed upon the promise of a third party to protect the Wabash Company therein.

On May 28, 1884, after something over $2,000 of the above amount had been expended, the Wabash Company filed in the court below an ancillary bill of complaint, wherein it averred its insolvency and prayed the court to decree a sale of its entire property for the benefit of its creditors. That the claims of all persons be ascertained, defined and determined by the court. That receivers be appointed, and after paying certain expenses to apply the residue to the discharge of all its debts, obligations and liabilities, according to the rights and legal and equitable priorities of all concerned as creditors or otherwise.

Afterwards, January 12, 1885, appellant, by leave of court, filed an intervening petition showing the payments to May 19, 1884, something over $2,000, and praying an order on the receivers to show cause why same should not be repaid to appellant, and for other and further relief as might appear equitable.

Later, June 10, 1889, appellant, by leave of court, filed a supplemental intervening petition, showing further and final payments, aggregating in all about $15,000, as above stated, and praying as before. Answers were put in and a hearing was had upon proofs reported by the master, showing without contradiction the expenditure of

the money under the circumstances above stated. The court, however, ordered a dismissal of the petitions, but without prejudice, on the ground, as appellant understands, that the court had not jurisdiction to determine the matter upon its merits.

Following is a particular statement of the pleadings and proofs before the court at the time the order of dismissal was entered.

Particular Statement.

The original petition, which was filed January 12, 1885, by leave of court, set forth, amongst other things, that during several years next before December 1, 1880, appellee, Wabash Company, had issued and sold coupon tickets from Omaha, Nebraska, to New York, via its own line, Omaha to St. Louis, and the lines of the Ohio and Mississippi, the Marietta and Cincinnati, the Baltimore and Ohio, the Philadelphia, Wilmington and Baltimore, and appellant's line, the latter extending from Philadelphia to New York.

That on December 1, 1880, appellant telegraphed the Wabash Company a request to discontinue the sale of all tickets to points north and east of Philadalphia, reading via the Baltimore and Ohio Railroad and appellant's line. That the Wabash Company on the same day answered in effect that such tickets had been ordered off sale. That on December 4, 1880, the Wabash Company acknowledged receipt from appellant of a circular, which circular was to the effect that such tickets would not be honored after the 10th of that month.

That, pursuant to the notices thus given and the infor-

mation thus received, appellant in good faith instructed its conductors not to receive in payment of fares coupons of such coupon tickets.

That December 2, 1880, at the request of the Baltimore and Ohio Railroad Company and upon its promise to protect the said Wabash Company in so doing, it, the said Wabash Company continued the sale of such coupon tickets on and after said December 2, 1880, of which said continued sale appellant had no notice or knowledge. That without appellant's knowledge the Wabash Company on December 7, 1880, at Omaha, Nebraska, sold to one W. J. Connell a coupon ticket of the kind above specified. That said Connell reached Philadelphia December 16, 1880, and taking passage on one of appellant's trains for New York presented the Philadelphia and New York coupon of said ticket in payment of his fare. That the conductor acting under his aforesaid instructions refused to accept the coupon and said Connell refusing to pay fare otherwise than by the surrender of said coupon, and refusing to leave the train, he was, without unnecessary force, ejected therefrom at Tacony, a regular station on appellant's said line.

That said Connell January 19, 1882, brought suit against appellant in the Superior court of Cook county, Illinois, for $15,000, alleged damages consequent upon such expulsion.

That appellant May 29, 1882, notified the Wabash Company in writing of the institution of said suit and that appellant would look to it, the said Wabash company, for reimbursement of any amounts appellant might be compelled to pay as damages or otherwise in consequence of the sale of the ticket to said Connell. And in the

same notice the Wabash Company was invited to join with appellant in the defense of said suit.

That a first and second trial of said cause was had; the second trial resulting in a verdict and judgment for $15,000. That the Appellate court of Illinois affirmed said judgment, but on appeal to the Supreme court of Illinois, said judgment was reversed and said cause was remanded May 18, 1884.

That the Wabash Company had not appeared in said cause or taken any part therein or paid anything toward the expenses thereof. That appellant had been put to a large expense in the defense of said suit up that time, and that said Connell had given notice that he intended to have said cause redocketed and brought on for another trial.

The prayer of the petition was that the receivers be ruled to show cause, if any they had, why an order should not be entered requiring them to repay to appellant the amount of the reasonable costs and expenses which appellant had paid, as aforesaid, together with all the proximate damages it had suffered by reason of the Wabash Company's neglect or refusal to obey appellant's said request, and that appellant might have such other and further relief in the premises as justice and equity might warrant and to the court seem meet.

A copy of the written notice and a copy of the opinion of the Supreme court was appended to the petition, marked Exhibits A, and B, respectively, and made a part of the petition. (Print, 60–72.)

The receivers answered January 27, 1885, setting forth that they had no knowledge of the matters set forth in the petition, and insisted on strict proof. That

if appellant had any cause of action it arose more than a year before the suit wherein they were appointed receivers was brought, and could not be construed to be a claim entitled to any priority of payment over the other general floating and unsecured indebtedness of the Wabash Company existing more than six months prior to the existing receivership. That appellant had no cause of action against the Wabash Company growing out of the sale of said ticket. That if the sale was unauthorized Connell alone had a cause of action against the Wabash Company on account thereof and the refusal to honor the ticket. That if appellant rightfully rejected the ticket, Connell had no cause of action for his expulsion, and the Wabash Company could not be made liable for the expenses attendant upon an unfounded action. That if appellant was not justified in rejecting said ticket and expelling Connell, it should bear the consequences. (Print., 72–3.)

February 14, 1885, the matter was referred to a master to ascertain and report the amount paid by appellant in the matter of defense of the suit, and March 18, 1885, the master reported that both parties had appeared before him; that the evidence had been taken and that the total amount which the petitioner was entitled to be reimbursed and paid was the sum of $2,577.50, provided the court should find as a matter of law that there was a liability. No objection was taken to the report and it was approved March 25, 1885, and at the same time an order was entered that the Baltimore and Ohio Railroad Company be summoned to appear therein and show cause, if any it had, why it should not be required to pay to the receivers the sum found by the master to be payable to it, $2,577.50, together with the costs of said proceeding to be taxed. (Print, 77–86.)

The supplemental intervening petition, which was filed by leave of court June 10, 1889, recited the contents of the original petition and exhibits and the proceedings taken thereupon as above shown. The petition set forth, as subsequently accruing matter, that since the filing of the original petition various steps had been taken in said cause, including a trial in February, 1887, wherein a verdict and judgment was obtained against appellant for the sum of $7,000. That an appeal was prosecuted therefrom to the Appellate court of Illinois, and again to the Supreme court of Illinois, where said judgment was affirmed. That the necessary and reasonable costs and expenses of said proceedings since the master's report upon the original petition amounted to the sum of $13,500, including the amount of said judgment of $7,000 and the interest thereon.

The prayer of the supplemental petition was that a rule might be entered requiring the receivers to show cause, if any they had, why an order should not be entered for repayment by them of the reasonable costs and expenses paid as aforesaid. That the petition be referred to a master to determine the amount of such reasonable costs and expenses and proximate damages, and that petitioner might have such other and further relief in the premises as justice and equity might warrant and to the court seem meet. (Print, 99–107.)

The receivers and the Wabash Company were by order of court both ruled to answer this supplemental petition within twenty days.

The receivers appeared, and July 8, 1889, moved for leave to withdraw their answer to the original petition and to demur thereto. The motion was allowed July 16,

1889, and the reference to the master in the matter of the original petition and the order of confirmation of his report were set aside. On the same day the Wabash Company and the receivers filed separate demurrers. The demurrer of the Wabash Company set up that, assuming the petitions to be true, appellant's remedy, if any, as against it, the said Wabash Company, was in a court of law, and not in a court of equity. The demurrer of the receivers set up that it did not appear from the intervening petitions that appellant had any interest, by way of lien or otherwise, in the property which formed the subject-matter of the suit wherein the receivers were appointed, and that said intervening petitions did not state any facts which would authorize the court to decree the alleged claim of appellant a lien upon said property or upon any funds in the hands of the receivers. (Print, 109, 110.)

The demurrer of the receivers was heard February 26, 1890, and taken under advisement. On September 4, 1890, the court overruled the demurrer and ruled the receivers to answer by the first Monday of October.

The receivers filed their answer September 10, 1890, setting forth in substance that they had no knowledge of the matters set forth in the petition, and insisted on strict proof. That if any cause of action on the part of appellant ever existed against the Wabash Company on account of the sale of said ticket it arose more than a year before the filing of the bill of complaint in the cause, and their appointment as receivers, and could in no manner be allowed or construed to be a claim entitled to any priority of payment over the other general floating and unsecured indebtedness of said Wabash Company, exist-

ing more than six months prior to the existing receivership. That the alleged unauthorized sale of said ticket by the Wabash Company was not the proximate cause of the recovery of said judgment. That said judgment was recovered on the ground of the excessive and unnecessary force used by appellant's servants in expelling Connell from its cars, and that the said judgment resulted from a wrongful act of appellant and not from any act of said Wabash Company. Replication to this answer was filed October 2, 1890. (Print, 111-113.)

The Wabash Company filed its answer October 14, 1890, setting forth in substance that it believed the allegations of said petition as to the sale of the ticket to said Connell and his expulsion from the cars of appellant, and the recovery of the judgment against appellant by said Connell to be true, but that the proximate cause of said recovery was excessive, and unnecessary force used by appellant's servants in expelling Connell, and that said judgement resulted from the wrongful act of appellant and not from any act of said Wabash Company. That if appellant had any claim growing out of the matters set forth in the petition it was cognizable only in a court of law, and that a court of equity had no jurisdiction to grant the relief prayed. Replication to this answer was filed October 16, 1890. (Print, 114, 115.)

The matter was referred to a master November 22d, to take proofs and report with all convenient speed. The defendants appeared before the master and attended the taking of appellant's proofs, but, as in the previous reference, introduced no testimony on their own part. The master filed his report January 16, 1891, from which it appears with reasonable certainty that the appellant had,

since the last report, paid reasonable costs and expenses incident to the defense of said cause, amounting to $13,328,94, including the judgment of $7,000 and the interest thereon. Appellant introduced documentary proof, consisting of a copy of the abstract of record which was before the state Supreme court in the case of the affirmance of the judgment; copies of the briefs of counsel therein, and a list of items of costs and expense aggregating the aforesaid amount of $13,328.94. This amount was exclusive of the amount shown in the master's report filed March 18, 1885. Said report, with the evidence therewith, being, by stipulation of counsel, to remain in full force. It was also agreed by counsel that the opinion of the state Supreme court on the last hearing of the case and reported in 127 Ill., 419, might be referred to as evidence in the case. (Print, 115–121.)

The scope and character of the cause of said Wabash Company against said Central Trust Company and others, wherein appellant intervened as aforesaid, appears from the ancillary bill of complaint which was filed in the court below May 28, 1884.

The ancillary bill averred that the complainant Wabash, St. Louis and Pacific Railway Company was a corporation under the laws of the State of Missouri, and May 27, 1884, had filed in the Circuit court of the United States for the Eastern district of Missouri a certain bill of complaint praying for the appointment of one or more receivers "to take within their charge and operate, pre-" serve and protect all the property" of the complainant lying within the States of Missouri, Iowa, Illinois, Indiana, Ohio, Michigan and elsewhere, forming a vast system of railroads. That the honorable Circuit court

of said Eastern district of Missouri, had accordingly appointed Solon Humphreys and Thomas E. Tutt as such receivers, and that they had qualified and as such receivers were then seeking to "reduce to their pos- "session all the property of orator of every kind and "description, and all rights, credits and interests of "orator in the several states aforesaid and elsewhere."

That in order that said receivers might be fully empowered to discharge their duties as such, it was prayed that the court would take cognizance of complainant's said bill and appoint the same persons receivers of its property within the jurisdiction of said Circuit court and give them the same powers as given by Circuit court for the Eastern district of Missouri.

That the court would make such orders and decrees preliminary and final, as were prayed for in said bill so filed in the Eastern district of Missouri, and that the court would also make all such other necessary orders, judgments and decrees as might be required in aid of the said suits so commenced in the Eastern district of Missouri; and give all the relief which might be necessary in accomplishing the purpose of the filing of said bill. That the court would take the copy of the original bill as a part of the ancillary bill, the complainant "making all "the averments and showing all the same facts as are "fully set forth in the bill" filed in the Circuit court for the Eastern district of Missouri, and that the court would give such other and further relief as might seem consistent with equity and good conscience. (Print, 1-3.)

In the original bill the complainant Wabash Company averred a vast indebtedness on its part, a portion of which was owing to a large number of persons, nearly all of

whom were pressing for payment and threatening legal proceedings. That its property was covered by a general mortgage and various sectional mortgages. That it had thoroughly considered and resorted to all proper measures to obtain the means with which to pay its floating indebtedness and meet the large amounts of accruing interest which would fall due at the beginning of the next month and continue to mature by installments at short intervals, but had wholly failed therein, and that it was then powerless to accomplish such purpose, and for the time being was practically insolvent. That in spite of its exertions it was certain that a default in payment of interest maturing in June then next following would occur, and that it was without means to meet its floating indebtedness. That as soon as default should be made in the payment of such interest a large number of suits would be commenced and its property would be seized under execution and attachment, and complainant would thereby be deprived of the means of operating its road and the unity of its system of roads would thereby be destroyed and irreparable injury be done. That complainant, conceiving it to be its duty to treat said property as a trust fund for the security first of its creditors and then of its stockholders, had determined to appeal to the court to take possession of the property and prevent it from being scattered and wasted.

The prayer of the complainant was that in order to protect the interests of all concerned, and to prevent a multiplicity of suits, the court would appoint one or more receivers with power to take possession of said entire property and to preserve, operate, manage and control the same; collect all debts due or to become due, and otherwise discharge all duties ordinarily given to receivers of railroad property.

That on the final hearing the court would decree the sale of the entire property "whether such decree shall "judicially foreclose said general mortgage or any of the "other mortgages aforesaid, or whether such decree shall "dispose of said property as a trust fund on general "equitable principles; that your Honors will cause all the "liens upon said property or any part thereof, and all "rights, claims and equities of all persons interested "therein—be ascertained, defined and determined, and "that the proceeds arising from the sale of such property "or any part thereof, be applied under the orders and "decrees of this court according to the rights, interests "and equities of parties or persons interested in said "fund." That the court, after paying the current expenses of operation, labor, supplies, rentals, services and money already advanced and paid to prevent forfeitures and such claims as require to be paid in order to prevent forfeitures of complainant's rights, "apply the residue or "surplus of all incomes, revenues and earnings of said "railroads, and all other assets coming into their hands "as such receivers, to the discharge of all debts, obligations and liabilities of orator according to the rights "and legal and equitable priorities of all concerned as "creditors or otherwise, under the direction of the court," and that complainant might have such other and further relief as the nature of the case should demand and to the court seem consistent with equity and good conscience. (Print, 3–15.)

The court below ordered that the order of the Circuit court of the United States for the Eastern district of Missouri be approved and taken to be the order of the Circuit court at Chicago, and that the receivers pro-

ceed to take possession of all and singular the railroads, rights, property and franchises of the complainant in Illinois, the court reserving to itself the power to make further orders in the premises as might seem necessary. (Print, 16, 17.)

The order of the Circuit court for the Eastern district of Missouri does not appear in the record. Its general effect, however, may be judged from the fact shown in the ancillary bill that it was an order appointing Humphreys and Tutt receivers upon the bill of complaint, a copy of which was annexed to said ancillary bill and made a part thereof.

A hearing was had February 26, 1891, upon the intervening petitions and the evidence reported by the master. The court took the matter under advisement and April ~~24~~ 15, 1891, ordered "that said petitions be dismissed without prejudice." (Print, 276, 277.)

From that order this appeal was taken as before stated.

Upon the record and proceedings in this cause the appellant assigns for manifest error the following and each of the following matters to wit:

Assignment of Errors.

1. The court erred in dismissing said original and supplemental petitions and each of them.

2. The court erred in not retaining said original and supplemental petitions and each of them for proper adjudication of the merits of appellant's claim as set forth therein.

3. The court erred in not retaining said original and supplemental petitions and each of them and decreeing

payment to appellant of the proper amount shown by the evidence to have been expended by it in the defense of the said suit of said Connell, and in the payment of said final judgment in said suit.

4. The court erred in not directing a trial by jury of the proper questions of fact and each of them arising upon said original and supplemental petitions and each of them and the answers thereto.

5. The court erred in not retaining the said original and supplemental petitions and each of them during a reasonable length of time for the proper adjudication at law of the question of appellant's right of recovery upon the facts stated in said petitions and each of them.

Wherefore appellant prays that said decree of the honorable Circuit court may be reversed, set aside and for nothing held, and that said cause may be remanded with proper directions.

The first, second, third and fourth assignments of error fall within the single proposition that the court had the power and that it was its duty to adjudicate the question of appellant's right to share in the distribution of assets, either directly or through the medium of the finding of a master in chancery or the verdict of a jury upon an issue *quantum damnificatus*.

The fifth assignment of error involves the proposition that if a suit at law was necessary to the adjudication of any particular question involved in the general question of appellant's right to share in the distribution of assets, it was the duty of the court, under the circumstances, to retain the petition a proper length of time to enable appellant to bring such suit and prosecute the same to judgment.

BRIEF.

I.

THE COURT ERRED IN DISMISSING SAID PETITIONS AND IN NOT RETAINING THEM FOR PROPER ADJUDICATION OF THE MERITS OF APPELLANT'S CLAIM AS IN SAID PETITIONS SET FORTH.

The court below took jurisdiction of the subject matter of the ancillary bill and entered upon the administration of the estate in Illinois. The following cases growing out of such administration reached this court:

Aerkfetz v. *Humphreys*, 145 U. S., 418.
Kohn v. *McNulta*, 147 *id.*, 238.
Humphreys v. *Perry*, 148 *id.*, 627.

The Circuit court for the eastern district of Missouri, took jurisdiction of the original bill and proceeded with the administration of the property in that state.

Railroad v. *Humphreys*, 145 U. S., 105.
Humphreys v. *McKissock*, 140 *id.*, 304.
Railroad v. *Humphreys*, 145 *id.*, 82.
U. S. Trust Co. v. *Railroad*, 150 *id.*, 287.

The question of jurisdiction over the subject matter of the original and ancillary bills was not raised in any of the above cases, nor is it raised in the present case.

Nor do the receivers, appellees herein, deny in their answer that the court had jurisdiction of the subject matter of appellant's intervening petitions. The Wabash Company alone avers that the matters set forth in the petitions are cognizable only in a court of law.

But such denial on its part is inconsistent with the prayer of said company that the court would ascertain and determine the rights of all persons interested in its estate and to apply all assets to the discharge of all its debts, obligations and liabilities according to the rights and legal and equitable priorities of all concerned as creditors or otherwise.

The Wabash Company is therefore estopped to deny jurisdiction.

Railroad v. *Howard*, 13 How., 307.
Carson v. *Hyatt*, 118 U. S., 279.
Means v. *Dowd*, 128 *id.*, 273.
Moore v. *Williams*, 132 Ill., 591.

It is settled that the Circuit courts of the United States will not take jurisdiction of a bill in equity to subject the property of the defendant to the payment of a simple contract debt in advance of any proceeding at law, either to establish the validity or amount of the debt, or to enforce its collection.

Cates v. *Allen*, 149 U. S., 451.
Scott v. *Neely*, 140 *id.*, 106.

The rule, however, does not apply to creditors seeking to establish their claims by way of intervention in cases where the court has already taken jurisdiction by bill in equity for the judicial administration of the estate.

In *Richmond* v. *Irons*, 121 U. S., 27, which was a bill brought by a judgment creditor on behalf of himself and all other creditors against an insolvent national bank, praying a discovery of assets and the appointment of a receiver and application of proceeds, it was held that the bill was for the judicial administration of the affairs

of the bank, and that no person was entitled to recover who did not come forward to present his claim.

See also Story's Equity Pleadings, Section 99 where, upon the subject of bills for the administration of estates, brought by one creditor for the benefit of all, it is said that:

"The other creditors may come in under the decree and prove their debts before the master to whom the cause is referred and obtain satisfaction of their demands equally with the plaintiff in the suit; and under the circumstances they are treated as parties to the suit."

The same rule applies however different and distinct the claims may be.

Id., Sections 116, 120, 125.

If it appear from the bill:

"That there will be a deficiency in the fund and that there are other persons interested in it as creditors or as legatees or otherwise * * * the court will permit them to come in and assert their claims before the master by its interlocutory decree."

Id., 104.

Railroad v. *Orr*, 18 Wall., 471.

In *Marsh* v. *Green*, 79 Ill., 385, the court say:

"As we understand the modern practice any person feeling that he has an interest in the litigation may apply to the court and be permitted to intervene and become a party and have his rights passed upon on the hearing."

In High on Receivers Sec. 349, it is said that when a receiver is appointed with a view of making equal distribution of the corporate funds to all creditors, creditors cannot enforce their demands by suit. In such case the very object and purpose of the bill is to have claim-

ants bring in their claims for adjudication so that the estate may be settled. Appellant, by its petitions did not seek a personal judgment or decree. The prayer in each petition was for the ascertainment of appellant's right to share in the distribution of the assets. Upon an allowance of appellant's claim payment thereof out of any surplus after satisfying preferred claims would of course have been proper. And in the absence of such surplus it would have been within the scope of the ancillary bill and the province of the court to have had recourse to the obligation of the Baltimore and Ohio Company.

That which appellant sought was incidental to the subject-matter of the ancillary bill. Indeed, it was strictly germane to the relief which the court had undertaken to grant by taking jurisdiction over the estate.

In 2 Story's Equity Jurisprudence, Sec. 794, the learned author, in treating upon the subject of compensation and damages, says:

"Courts of equity do not entertain jurisdiction to give redress by way of compensation or damages where these constitute the sole objects of the bill. * * * Compensation or damages (it should seem) ought therefore, ordinarily, to be decreed in equity only as incidental to other relief sought by the bill and granted by the court; or where there is no adequate remedy at law, or where some peculiar equity intervenes."

In the administration of the Wabash Company's estate jurisdiction of the court necessarily extended to the adjudication of all questions of right to the whole or any portion of the assets.

It is undeniable that at the time the ancillary bill was filed, appellant had a claim against the Wabash Company

for upwards of $2,000, which was afterwards increased to about $15,000, for money paid, laid out and expended in defense of the Connell suit.

The claim was not for unliquidated damages. It involved only the question of right to be reimbursed the amount which it had necessarily and reasonably paid out and expended in the defense of a law suit, the defense of which belonged to the Wabash Company.

The proof was clear and uncontradicted as to the amount thus paid and the only question remaining was whether under the undisputed evidence the Wabash Company's secret sale of the ticket gave appellant a right to have the amount refunded out the company's estate provided there was a surplus after paying secured creditors and if there should be no surplus or a deficiency then whether appellant had a right to have the obligation of the Baltimore and Ohio Company marshalled for appellant's benefit.

If, however, appellant's claim had involved the question of unliquidated damages the court had jurisdiction to determine and settle that question also.

Kohn v. *McNulta*, *supra*, was a case of intervention for allowance of damages for personal injuries to appellant Kohn whilst engaged in the service of appellee McNulta, as receiver for the Wabash Company, in the State of Ohio.

The Circuit court took cognizance of the petition, and the matter was referred to a master, but afterwards, on the petitioner's motion, the order of reference was set aside and a jury was called and empaneled. The court left to the jury the single question of amount of damages, and the jury fixed it at $10,000. The court, however,

upon examination of the testimony, held that no cause of action had been made out, and so set aside the verdict and dismissed the petition. From that decision the petitioner Kohn, appealed.

No question appears to have been raised as to jurisdiction of the court over the subject-matter of the petition. It was, however, contended that the verdict of the jury was right and should not have been set aside. The contention was overruled, and the decision of the Circuit court was sustained upon the merits of the case, as shown by the evidence preserved in the record.

As to the mode of procedure therein the court said:

"The intervention was a proceeding in a court of equity and that court may direct a verdict by a jury upon a single fact, or upon all the matters in dispute; but such verdict is not binding upon the judgment of the court. It is advisory simply, and the court may disregard it entirely or adopt it *in toto*."

Humphreys v. *Perry*, *supra*, was also a case of intervention involving the question of unliquidated damages, the petition being filed in the same court and the same case in which the present appellant intervened. The injury, however, was not personal, but consisted of the loss of a quantity of jewelry whilst in transit.

The court below took jurisdiction of the petition, referred the same to a master, and on the master's report, accompanied by the evidence taken, adjudged the merits of the case.

On appeal to this court the evidence was reviewed and the decision of the court below was reversed on the merits. No question was made as to the jurisdiction of the court in the premises.

In 2 Story's Equity Jurisprudence, section 795, it is said:

"The mode by which such compensation or damages are ascertained, is either by a reference to a master or by directing an issue, *quantum damnificatus*, which is tried by a jury. The latter used to be almost the invariable course, in former times, in all cases where the compensation was not extremely clear as to elements and amount; and this course is still commonly resorted to in all cases of a complicated nature. But the same inquiries may be had before a master; and in cases where such inquiries do not involve much complexity of facts or amounts, this course is now often adopted."

In note 2 to the above section numerous cases are cited in support of the text, among them the following:

Pratt v. *Law*, 9 Cranch., 456.
Kelsey v. *Hobby*, 16 Pet., 269.
Denton v. *Stuart*, 1 Cox, 258.
Phillips v. *Thompson*, 1 John., Ch. 150.
Parkhurst v. *Cortlandt*, *id.*, 285.
Woodcock v. *Bennett*, 1 Cowan, 711.

Pratt v. *Law* and *Kelsey* v. *Hobby*, *supra*, were cases in equity growing out of partnership matters and involved elements of unliquidated damages. In the first mentioned case the court said, page 494:

"An issue *quantum damnificatus*, it is certainly competent to this court to order in this case; but it is not consistent with the equity practice to order it, in any case in which the court can lay hold of a simple, equitable and precise rule to ascertain the amount which it ought to decree."

In *Kelsey* v. *Hobby*, *supra*, the complainant filed his bill in the Georgia Circuit court alleging an agreement in writing for the dissolution of partnership and praying a discovery of assets and payment of a certain amount of money as specified in the contract.

The answer set up failure on part of the complainant

to protect the defendants from a certain judgment against the late firm, as provided for in the agreement, whereby injury was done to the business reputation of the defendants, thereby causing them damage. Replication was filed and the cause referred to a master. Pending the proceedings, complainant went to New York on business and whilst there was sued at law by the defendants for the damages set up in the answer—the suit being brought upon the supposition that the Georgia Circuit court had no jurisdiction to ascertain and award the alleged damages in the chancery suit. Before leaving New York the parties executed an agreement purporting to compromise and settle the subject matter of both suits.

The compromise agreement was filed in the suit in Georgia, and a dismissal thereof asked by the defendants. The complainant objected on the ground that said alleged agreement was obtained by undue influence, and upon final hearing that defense was sustained, and the compromise agreement was decreed to be void. The decree however, allowed the defendants by way of offset the sum of $300 damages against complainant, for non-performance of his agreement to take care of the judgment. The defendants appealed, but the decree was affirmed. We quote from the opinion as follows, page 278:

"The suit was brought for damages alleged to have been sustained by the failure of Hobby to indemnify the appellants against the claims of the Branch Bank of the United States hereinbefore mentioned. It is true that the plaintiffs in the suit were advised by counsel that they could not be allowed for these damages in the proceeding in equity, because they were unliquidated, and they ought not therefore to be held accountable for that error. Yet it is very clear that the suit should not have been brought; because these damages formed one of the items in controversy between the parties in the suit in chancery,

which had been so long pending between them. And the court had not only jurisdiction over the subject, but it was bound to ascertain and allow them before it could adjust the accounts and grant the relief to which the complainant was entitled. The mode by which a court of chancery ascertains the amount in cases of that description is either by a reference to the master, or by sending an issue of *quantum damnificatus* to be tried by a jury. The cases upon this subject are collected and arranged in 2 Story's Commentaries on Equity, c. 19, p. 104. And the damages in question were in fact ascertained by the court and deducted from the amount due to Hobby in the decree now under examination."

Phillips v. *Thompson et al.*, *supra* was a bill in equity for discovery of assets and payment of a certain sum for damages to real estate, according to an alleged agreement with the defendants.

The answer denied the alleged agreement, but admitted that plaintiff was entitled to some compensation for damages done to his land in the building of a drainage canal. The chancellor found from the evidence that there was no contract, and the question then arose whether the bill ought to be dismissed or retained for the ascertainment of the amount of damages really done, and for decree of payment accordingly. The chancellor premised that the complainant might meet with insuperable difficulties in the prosecution of a case at law at that late day for the damages, and therefore the case before him presented strong claims for the interference of a court of equity in securing to him due and adequate compensation. And on authority of:

2 Fonb., 441.

Clifford v. *Brooke*, 13 Ves., 131.

Denton v. *Stuart*, *supra*.

Greenaway v. *Adams*, 12 Ves., 395.

Hedges v. *Everand*, 1 Eq. Cas. Abr., 18, pl. 7. *Id.*, 131, pl. 12.
Cudd v. *Rutter*, 1 P. Wms., 570.
Errington v. *Aynesly*, 2 Bro., 341.

the bill was retained and complainant awarded an issue *quantum damnificatus*, all further questions being reserved until return of the *postea* on such issue.

The chancellor added that "where the damages are "not a mere computation" the more usual course was to award an issue.

Parkhurst v. *Van Cortlandt*, *supra*, was a bill for specific performance of an alleged contract for the sale of real estate under which the grantee or obligee had made improvements. The contract was held not binding, and the question was whether the complainant, who was the obligee in the alleged contract, was entitled to have the bill retained for assessment and award of compensation for his improvements. The chancellor held in the affirmative on authority cited in *Phillips* v. *Thompson*, *supra*.

Woodcock v. *Bennett*, *supra*, arose also on a bill for specific performance. The court below sustained the bill, but the defendant having put it out of his power to perform, the case was referred to a master to ascertain complainant's compensation and damages.

On appeal it was contended among other things that the bill should have been dismissed, and that if complainant was entitled to any compensation in damages an issue ought to have been awarded to ascertain the amount. The court held that the complainant was not entitled to the full measure of relief granted by the court below, and so reversed the decree. But the court, on authority of *Denton*

v. *Stuart, supra*, approved of the action of the chancellor in referring the case to a master to ascertain the compensation and damages instead of directing an issue of *quantum damnificatus*. Page 755.

II.

THE COURT ERRED IN NOT RETAINING SAID PETITIONS DURING A PROPER LENGTH OF TIME TO ENABLE APPELLANT TO BRING SUIT AT LAW AND PROSECUTE THE SAME TO JUDGMENT.

The Wabash Company was a corporation of Missouri and had its principal office in the city of St. Louis in said state. (Print, 3, 4.) For that reason its property in Illinois was subject to attachment and sale at the suit of any creditor.

Sections 1 and 31, chapter 2, "Act of December 23, 1871, entitled "Attachment" 1 Starr and Curtis Statutes Illinois, page 308 provide as follows:

SECTION 1. *Be it enacted by the People of the State of Illinois*, represented in the General Assembly; That in any court of record having competent jurisdiction, a creditor may have an attachment against the property of his debtor, or that of any one or more of several debtors, when the indebtedness exceeds $20, in any one of the following cases:

First, Where the debtor is not a resident of this state.

Second, etc., etc.

SECTION 31. *Attachment in aid.* The plaintiff in any action of debt, covenant or trespass, or on the case upon promises, having commenced an action by summons or capias, may, at any time pending such suit, and before judgment therein, on filing in the office of the clerk where such action is pending, a sufficient bond and affidavit showing his right to an attachment under the first section of this act, sue out an attachment against the

lands, goods, chattels, rights, moneys, credits and effects of the defendant, which attachment shall be entitled in the suit pending, and be in aid thereof; and such proceedings shall be thereupon had as are required or permitted in original attachments, as near as may be."

The constitution of the state adopted in 1870 provides as follows:

"Section 10. The rolling stock, and all other moveable property belonging to any railroad company or corporation in this state, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the General Assembly shall pass no law exempting any such property from execution and sale."

At the time of the filing of the original intervening petition appellant's remedy at law by way of attachment had been suspended or destroyed by the action of the Circuit court taken at the instance of the Wabash Company whereby jurisdiction in equity was obtained over all of said company's property in Illinois. Nor has that remedy since been restored.

The only remedy left to appellant was by way of intervention in the chancery suit either before or after the liability of the Wabash Company to appellant had been adjudicated.

The court had personal jurisdiction of the Wabash Company. It was voluntarily before the court seeking equity from its creditors with reference to the distribution of its property.

The Circuit court in chancery having, at the instance of the Wabash Company, which was seeking equity, taken away or suspended appellant's legal right to an adjudication in Illinois through the medium of an attachment suit, it is a pertinent question whether it would be

doing equity to compel appellant to seek said company in Missouri and there or elsewhere adjudicate the question which in the absence of the suit in equity appellant might have had adjudicated in Illinois? The question, we think, admits of but one answer and that in the negative.

The order allowing appellant to intervene was therefore right and proper. If any doubt arose afterwards upon the hearing, appellant should have been given the benefit of it since the lapse of more than six years' time from the date of the order, made it especially difficult and doubtful whether the appellant, even by going into the State of Missouri could find the insolvent company.

If it could be rightly held that a suit at law was necessary to the adjudication of the claim before appellant could go into the suit in equity to obtain payment out of the assets being administered upon, appellant's petitions having been put in by leave of court they should have been retained during a reasonable time, in which appellant might bring such suit and obtain such adjudication.

This proposition has support in *Phillips* v. *Thompson*, *supra*.

Appellant submits that the decree should be reversed and the cause remanded with proper directions.

GEO. WILLARD,
Solicitor for Appellant.

George Willard.

157-221

Office Supreme Court, U. S.
FILED.
DEC 11 1894
JAMES H. McKENNEY,
CLERK.

157-225

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1894.

No. 158.

THE PENNSYLVANIA RAILROAD COMPANY, *Appellant*,

vs.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO., and SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of said Company, *Appellees*.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL BRIEF FOR APPELLANT.

GEO. WILLARD,
SOLICITOR.

BARNARD & HORNSTEIN, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL BRIEF FOR APPELLANT.

GEO. WILLARD, SOLICITOR.

I desire, upon leave of court, to add to my brief and discuss two additional propositions, viz: First, that the record shows a state of facts which, the court having jurisdiction, warrants a decree granting the relief prayed. In other words, that appellant has a meritorious case. Second, that appellant has not ratified or confirmed the wrongful act of appellee in selling the ticket.

FIRST, AS TO THE MERITS OF THE CASE.

1. Appellant's right to control the sale of tickets over its own line; and appellant's proper exercise of that right, in this instance, are undoubted.

The Wabash company not only made no objection, but, by its telegram, virtually assented and promised obedience to appellant's order to discontinue the sale of tickets to all points north and east of Philadelphia, reading *via* Baltimore and Ohio Railroad and appellant's line. See telegrams, print 62. See also appellant's general notice to connecting lines and the Wabash company's answer thereto, print 62, 63.

2. Appellant's order to its conductors, print 147, not to honor such tickets after December 10th, was reasonable, and, without doubt, was given in good faith.

3. After the Wabash company, by its telegram of December 1st, had told appellant that tickets of the kind described had been ordered off sale, and after it had acknowledged receipt of appellant's notice to connecting lines to discontinue further sale of such tickets, it wrongfully and without any notice to appellant violated its promise and duty to obey appellant's order in the premises. Without any notice to appellant said company intentionally continued such sale, and on the 7th of December at Omaha sold a ticket of the kind in question. "The Wabash company did not take any action with "reference to the notice contained in the circular of "December 2, 1880. * * * The Wabash company "never ceased selling tickets over the route named in "that circular." Crane's evidence on last trial. Print 174-5.

4. Appellant's passenger conductor, to whom the ticket was presented for passage on December 16th, could not, under the order of December 1st, by appellant, accept or honor such ticket, and there is really no room for doubt that he in good faith obeyed the order, as he was bound to do.

5. In the answers of appellees it is averred that the sale of the ticket in question was not the proximate cause of the recovery of the judgment, but that the judgment was recovered upon the ground of excessive and unnecessary force used in expelling said Connell from the train. Print 112, 114. The averment is not tenable.

The proximate cause of recovery was the conductor's refusal to accept the ticket. As to the measure of damages which might thereupon be recovered the court below instructed the jury "that the plaintiff was entitled "to recover compensation for loss of time, or actual "pecuniary loss, as the result of being forcibly ejected "from the train and for bodily pain." See Supreme court opinion, 112 Ill., 303. Under that instruction the jury rendered a verdict for $15,000, and judgment was entered thereon for that amount.

On appeal to the Supreme court the judgment was reversed on the ground that the instruction was erroneous. The court said:

"We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton."

The judgment having been reversed and the cause afterwards tried according to the law as laid down by the Supreme court, the jury found a verdict for $7,000, a sum $8,000 less than the former verdict. That is to say, that such damages as the plaintiff sustained by being forcibly ejected from the train amounting, as it may be presumed, to $8,000 were not allowed for the reason that the expulsion was not wanton or malicious or accomplished with undue force or violence.

In this connection it is worthy of notice that the Supreme court held on the first appeal that

"Appellee refusod to pay or leave the car, and the conductor stopped the train at a regular station and put appellee off by force, *but it does not appear that more force was used than was necessary.* * * * The conductor was ordered by his superior officer not to receive a ticket like the one presented. The order he was bound to obey, and so far as appears *he acted in good faith.*" See 112 Ill., 304, 306.

Here then was an express finding and judgment that no excessive force was used and no bad faith manifested.

On the second appeal it was admitted by counsel that the facts recited in the record were substantially the same as those recited in the opinion above qnoted from. Print 251, 260.

The evidence on the second trial showing what occurred on the train may be found in the testimony of Conductor Wilson, Print 129-139, and 149, 150; acting brakeman Uberoth, Print 138-146, and the plaintiff Connell, Print 151-172. A reading of the testimony will show that the jury were right in the omission of $8,000, from the former verdict, on the ground that the alleged physical injuries were received, if received at all, in consequence of the plaintiff's own wrongful act of forcible resistance.

The elements or sources of damage upon which the jury were allowed to find their verdict on the last trial were three in number, viz: (1) the cost of a ticket from Taconey, where plaintiff was put off, to New York; (2) such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily occasioned thereby, and (3) reasonable damages for the indignity in being expelled from the train. See opinion 112 Ill., 305; 127 Ill., 422.

The element of indignity for which Connell was allowed to recover, was, of course, an element regarding which damages could only be estimated, as there is no rule for computing them. The question of amount rested entirely in the reasonable discretion of the jury, the standing of the parties, and all the circumstances considered.

In this case the plaintiff was a practicing lawyer of high standing. As between appellant and himself his expulsion was wrongful, and it was enforced in the presence of ladies and gentlemen, who were with him in the passenger car, and in the presence of others at the station.

The indignity was heightened from the fact that although Connell was a man of wealth and high standing, he happened to be at the time without ready money, and had to pawn his watch to obtain a night's lodging in New York. Connell's testimony, Print., 157-8.

The question of amount which appellant should recover upon its petition, if anything, was before the Master, to whom the case was referred, to take testimony and report. See orders of reference, Print., 74, and 115. Appellees were represented before the Master upon the taking of proofs. Print., 79, and 116. There is no claim of record that the amount proven, $13,328.94, is excessive.

SECOND. AS TO THE QUESTION OF RATIFICATION.

It appears from the deposition of Morris Trumbull, print 176, that a coupon ticket account was kept between the two companies and was settled from month to month. That some time about January 31, 1881, the Wabash Company reported its coupon ticket sales over appellant's lines for the month of December, 1880, aggregating $1,573.32. That the ticket in question was shown in said report as No 5, form O 145, $252, and that said amount was paid to appellant and had not thereafter been refunded.

John D. Taylor deposed that he, as treasurer for appellant, drew a draft on the Wabash Company February 10, 1881, per order of the auditor of passenger receipts for appellant, for $636.77, that being the amount due from the Wabash Company to appellant for ticket account for the month of December, 1880. Print 178.

It is, I suppose, a fair presumption that the draft was for the balance of the $1,573.32 reported by the Wabash Company after deducting the amount of appellant's receipts for coupon tickets sold over the Wabash lines for the same period. The question is whether between the two companies the receipt and retention of the price of the ticket constitutes under all the circumstances a ratification of its sale by the Wabash Company.

The question of ratification does not appear to have been presented to the State Supreme court in the Connell case, and is not referred to in either of the opinions rendered.

The law applicable to the question of ratification has been declared as follows:

"Where one without objection suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, though no previous authority exist, in all respects as though the requisite power had been given in the most formal way."

Bronson's Ex'r v. *Chappell*, 12 Wall., 681.

The person performing the acts relied on to constitute a ratification must possess the power to perform the acts ratified.

Marsh v. *Fulton County*, 8 Wall., 676.

This requirement applies to an employe, agent or officer of the principal.

Insurance Co. v. *Huth*, 49 Ala., 529.
Dorsey v. *Abrams*, 85 Pa. St., 299.
Barnard v. *Wheeler*, 24 Me., 412.

The acts relied on must have been performed with full knowledge of all the material facts and circumstances.

Drakely v. *Gregg*, 8 Wall., 242.
Kerr v. *Sharp*, 83 Ill., 199.

The person performing the acts relied on to constitute a ratification must have known the character of the acts to be ratified, and to know that without ratification there is no liability.

Navigation Co. v. *Dandridge*, 8 G. & J. (Md.), 248.
Billings v. *Morrow*, 7 Cal., 171.

The acts relied on must warrant an inference that a ratification was intended.

Stark v. *Starr*, 94 U. S., 477.
Rogers v. *Marshal*, 1 Wall., 644.
Starkweather v. *Goodman*, 48 Conn., 401.
Abbott v. *May*, 50 Ala., 97.
Burr v. *Howard*, 58 Ga., 564.
Story on Agency, Secs. 252, 256, 259, 260.

To constitute a ratification the acts must be such as to prejudice the party who claims the benefit of them.

Doughaday v. *Crowell*, 11 N. J. Eq., 201.
Whitmore v. *Hamilton*, 51 Conn., 153.

Obtaining indemnity against loss does not amount to a ratification.

Hortons v. *Townes*, 6 Leigh, 47.

Tested by the rules thus laid down was there, as between appellant and the Wabash Company, a ratification of the latter's act in selling the ticket—a sale which has resulted in great trouble and expense?

The circumstances under which appellant's treasurer, by order of appellant's auditor and by tacit invitation of the Wabash Company itself, drew upon said company for the balance of ticket sales in the month of December were these:

The ticket, as already stated, was sold on the 7th December. On the 16th December appellant refused to honor the ticket. By that act of refusal appellant positively and emphatically repudiated the sale.

Under date January 18, 1881, Connell wrote to appellant's General Manager, demanding redress on account of

the expulsion. The letter is referred to by Connell in his testimony, Print 161, and on the trial in May, 1883, resulting in the first judgment it was put in evidence showing the date above mentioned.

When therefore appellant's treasurer, by order of appellant's auditor and by the tacit invitation of the Wabash Company, drew upon said company, February 10, 1881, for the balance of December account of ticket sales, appellant was under a legal liability to Connell for damages resulting from the wrongful act of the Wabash Company in selling the ticket: the Wabash Company being liable over to appellant for such amount as appellant should be compelled to pay.

It was certain that Connell had a right of recovery against appellant for the amount he paid for the coupon reading over appellant's line, Philadelphia to New York, how much more than that was uncertain.

Under these circumstances appellant had a right to receive from the Wabash Company as security against the claims of Connell the amount of money which the Wabash Company had obtained for the coupon in question, and the act of appellant's treasurer and auditor done on the tacit invitation of the Wabash Company should in reason be deemed in pursuance of that right rather than in destruction of appellant's right of recovery over.

Appellant's receipt of the amount did not in anywise prejudice the Wabash Company. The money did not belong to the Wabash Company. It belonged to Connell, and he had a legal claim against appellant therefor. The Supreme court held that in selling the ticket the Wabash Company acted as the agent of appellant, in-

stead of appellant acting or being the agent of the Wabash Company for the performance of the contract made through the sale of the ticket. (See opinion 112 Ill., 301.) The Wabash Company was, therefore, under no liability to Connell in the matter.

The amount thus received by appellant is to that extent a reduction of the amount which appellant would otherwise be entitled to recover in this proceeding.

The intentions of a person are, of course, to be determined by what he says and does.

It would seem unreasonable to suppose that the mere act of appellant's auditor and treasurer in receiving from the Wabash Company the price of the coupon, was a ratification of the contract, which, under the orders of appellant's first vice-president, had before been expressly repudiated. The Wabash Company's obligation to indemnify and save appellant against loss should not be so easily released.

The Wabash Company's liability is asserted in the notice which appellant, by its general solicitor gave to the Wabash Company, under date of May 13, 1882, that appellant would look to the Wabash Company for reimbursement of any amounts the former might be compelled to pay as damages or otherwise in consequence of the sale of the ticket. See notice, Print 67.

2. The act of appellant's auditor and treasurer in drawing upon the Wabash Company cannot be presumed to have been done with full knowledge of all the material facts.

If they had known anything about the Connell affair, or that the making of the proposed draft would operate to release appellant's right to indemnity against Connell's

claim and appellant's right of recovery over against the Wabash Company for such amount as appellant might be compelled to pay to Connell they would naturally have consulted with their superior officers, and would thereupon have been advised against making the draft. It is quite certain that appellant's general ticket agent, general manager, first vice-president, general solicitor or any officer superior to the treasurer and auditor would have advised them not to do it, and the advice would have been followed.

Tested by the authorities above cited, receipt and retention of the money in the manner and under the circumstances shown does not, I submit, constitute a ratification of the act of the Wabash company in selling the ticket contrary to appellant's orders and contrary to said company's promise of obdience thereto.

Respectfully submitted.

GEO. WILLARD,
Solicitor for Appellant.

157-223

Office Supreme Court, U. S.
FILED.
JAN 5 1895
JAMES H. McKENNEY,
CLERK

157-223

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Supreme Court of the United States.

OCTOBER TERM, 1894.

THE PENNSYLVANIA RAILROAD COMPANY, *Appellant*,

vs.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, AND SOLON HUMPHREYS AND THOMAS E. TUTT, AS RECEIVERS OF SAID COMPANY, *Appellee*.

No. 158.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

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IN THE

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STATEMENT OF THE CASE.

This is an intervention in a court of equity against the Wabash Company and the Wabash receivers, to recover back a large sum of money expended by the Pennsylvania Railroad Company in defending a damage suit brought against it by one William J. Connell. The facts out of which the litigation with Connell arose are, substantially, as follows:

In 1880, the Wabash, St. Louis and Pacific Railway Company operated a line of railroad from Omaha to St. Louis, and intervenor (the Pennsylvania Com-

pany) had a line from Philadelphia to New York, and for a long time the Wabash Company had been accustomed to sell, as an agent of the Pennsylvania Company, coupon tickets to passengers through from Omaha to New York, over its own and connecting lines as far as Philadelphia, and then from Philadelphia to New York over the Pennsylvania Road. On the first day of December, 1880, the Pennsylvania Company, for reasons not disclosed in the record, sent the Wabash Company a telegraphic message reading as follows:

"December 1, 1880.

GEO. H. DANIELS,
W., St. L. & P. Ry., St. Louis, Mo.

On receipt hereof please discontinue sale of tickets to all points north and east of Philadelphia, reading *via* Baltimore and Ohio Railroad and this line. Please answer. L. P. FARMER."

The Wabash Company received the message, and replied as follows:

"ST. LOUIS, MO., Dec. 1, 1880.

L. P. FARMER.

Tickets reading *via* Baltimore and Ohio Railroad to points east and north of Philadelphia have been ordered off sale. GEO. H. DANIELS."

On December 2d, 1880, a general notice was issued by the Pennsylvania Company, and a copy thereof mailed to a proper agent of the Wabash Company at St. Louis, which notice was substantially as follows:

"PENNSYLVANIA RAILROAD COMPANY,
PASSENGER DEPARTMENT.
PHILADELPHIA, Dec. 2, 1880.

GENERAL NOTICE.

Connecting railways and transportation lines are hereby notified to discontinue the sale of tickets and the

checking of baggage over this line between Philadelphia and New York, or other points *via* the Baltimore and Ohio Railroad, from date, and are respectfully informed that such tickets will not be honored or baggage received or forwarded after December 10th, 1880.

By order of the First Vice-President.

L. P. FARMER,
Gen'l Pass. Agent."

On December 7th, 1880, the Wabash Company made written acknowledgment of the receipt of the foregoing notice, and thereupon the Pennsylvania Company instructed its conductors not to receive in payment of fares the coupons of any such tickets sold by the Wabash Company, after December 10th, 1880. But in the meantime the Baltimore & Ohio Railway Company—having learned of the action taken by the Pennsylvania Company with respect to the sale of tickets over the B. & O. Line, from points west to Philadelphia, and from thence to New York over the Pennsylvania Road—on December 2d, 1880, sent to the proper agent of the Wabash Company a message reading as follows:

"BALTIMORE, MD., Dec. 2, 1880.

To GEO. H. DANIELS,
Wabash Ry., St. L.

Please get up quickly tickets New York and points east by B. & O., and Boundbrook route trains run Chicago & Cin'ti N. Y. without change. Coupons should read Balto., Phila. & Boundbrook R. R., Phila. & Reading R. R., Phila. & Boundbrook Central R. R., New Jersey, Boundbrook, N. Y., until you get them on continue sales Penn. R. R. tickets by B. & O., reporting entire proportion east Baltimore to B. & O., we are exchanging, and will protect; answer.

L. M. COLE."

After the foregoing correspondence had taken place, the Wabash Company, on December 7th, 1880, sold to William J. Connell, at Omaha, a coupon ticket from Omaha to New York, purporting on its face to be good over B. & O. to Philadelphia, and good from Philadelphia to New York over the Pennsylvania road. When Connell arrived in Philadelphia he took passage December 16th, 1880, for New York, on a train of the Pennsylvania Company, and presented the tickets so purchased to the conductor in payment of his fare, but the conductor, acting under instructions received from his superiors, refused to receive it, and as Connell refused to make further payment, the conductor ejected him from the train at a regular stopping place, called Tacona. Connell then brought suit against the Pennsylvania Company, and recovered a judgment against it in the Superior Court of Cook County, Illinois, for the sum of fifteen thousand dollars. The case was appealed to the Supreme Court of Illinois, where the judgment of the Superior Court was reversed on account of error in an instruction touching the measure of his damages, and because upon that trial there was no evidence that any unnecessary force or violence had been used in ejecting him.

Upon that appeal the Supreme Court, in its opinion, reviewed the circumstances under which the ticket was sold, and held, that as between him and the Pennsylvania Company, Connell was rightfully on the train. In passing on that phase of the case the court (printed record, p. 70), said:

"The conductor had been ordered by his superior not to receive a ticket for fare over the road like the one presented by appellee, and when, in the discharge

of his duty as conductor, he called upon appellee for fare, and the ticket was presented, he notified appellee that he could not receive the ticket, and at the same time informed him that he must pay fare to New York. This appellee refused to do, and then the conductor notified him that he must pay the regular fare or leave the train. Appellee refused to pay or leave the car, and the conductor stopped the train at a regular station, and put appellee off by force, but it does not appear that more force was used than was necessary. This was in substance the transaction. Conceding the appellee, by virtue of his ticket, was entitled to be carried over appellant's road, the question presented is whether he can recover damages for being forcibly expelled from the train, or was it his duty, when notified by the conductor that he would not receive the ticket, to pay his fare under protest, or leave the train, and hold the company responsible for the expulsion, without compelling the conductor to resort to force. Had appellee paid the fare demanded, he could have sued the company, and recovered for a breach of contract. Had he left the train when the conductor refused to receive the ticket, and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor in expelling him from the train. But can he recover for the force used by the conductor, which he, by his own act, induced the conductor to resort to in order to put him off the train?"

The record shows, that before the first trial of the case of Connell against the Pennsylvania Company was had in said Superior Court, the Pennsylvania Company notified the Wabash Company of the institution of that suit, and informed the Wabash Company that it would look to it for reimbursement of any amount the Pennsylvania Company might be required to pay as damages, or otherwise, on account of the sale

of the ticket to Connell, and invited the Wabash Company to join in the defense of the suit. But to that notice and invitation the Wabash Company made no response.

Upon the second trial of the case, Connell recovered a verdict and judgment for seven thousand dollars, and that judgment the Supreme Court of Illinois affirmed, because upon that trial there was evidence tending to show that the conductor, in ejecting Connell, acted wantonly and maliciously.

It was stipulated (printed record, p. 118) that the second opinion of the Supreme Court might be considered in evidence as a part of this record. And in stating the grounds on which the last verdict in favor of Connell ought to be affirmed, the court (127 Ill., p. 422) said:

"In the plaintiff's seventh instructiou the jury were, in substance, directed, that if they found the issues for the plaintiff, in fixing the amount of damages, it would be proper to allow the plaintiff the cost of a ticket from Taconey to New York, and such damages as he sustained on account of the delay occasioned by being required to leave the train; and if the conductor or brakeman, in a reckless or wanton manner, used more force than was reasonable and necessary for the purpose of ejecting him, and in consequence of such excessive use of force plaintiff was injured, it would be proper to allow such damages as would fairly compensate him for injuries which resulted directly from such excessive force; that if the acts of the conductor in refusing plaintiff's ticket, demanding fare and ejecting him from the car, were willful, wrongful and malicious, and the plaintiff suffered idignity and injury thereby, damages may be allowed for such acts. This charge to the jury, it is claimed, was erroneous. We do not

concur in that view. We think the instruction was fully warranted by what was said in the opinion when the case was here before. In speaking upon this branch of the case, it was said: 'We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place at which he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton.' The charge to the jury was doubtless prepared in view of what the court had previously said, and in all its essential features it conforms to the opinion when the case was first before us.

It is also urged as an objection to the seventh instruction, that it submits to the jury, as a ground for the assessment of damages, whether the acts of the conductor were willful or wanton, when there was no evidence upon which that question could properly be submitted. If there was no evidence whatever tending to prove willful or wanton conduct on the part of those in charge of the train, an instruction submitting that question to the jury might be regarded as erroneous, as the instructions to a jury should be predicated upon the evidence. In the Appellate Court, where the evidence in all cases is reviewed and passed upon, in remarking upon the evidence, it is said: 'It was an appropriate question for the jury, under all the evidence, whether the force used by the servants of appellant in ejecting appellee was unjustifiably violent and excessive, and whether such injuries as he sustained during the expulsion were wantonly and maliciously inflicted. The evidence tended to show that appellee received injuries from which serious results followed, and while there is some conflict as to what was said and done by the conductor

prior to and during the expulsion, we cannot say that the conclusion reached by the jury is without support in the evidence.' We have examined the evidence as it now appears in the record, and while it may be slight, we are not prepared to hold that the Appellate Court has placed an incorrect construction upon it."

Afterwards, in May, 1884, nearly four years after the alleged wrongful sale of the ticket was made to Connell, the Wabash Company became insolvent, and filed its bill in the Circuit Court of the United States for the Eastern District of Missouri, praying for the appointment of receivers over its property. The bill so filed is found in this record, but the order made by the court thereon does not appear, and the whole tenor and scope of that order is left wholly to conjecture. We find, however, in this record the order made in the Circuit Court of the United States for the *Northern District of Illinois*, upon an ancillary bill, filed there by the Wabash Company, but that order only directed the receivers to take possession of so much of the property of the company as was found *in the State of Illinois*.

THE INTERVENING PETITION.

On the facts above stated, the Pennsylvania Company, in January, 1885, filed in the Circuit Court of the United States for the Northern District of Illinois, its intervening petition, and afterwards an amended one, against the Wabash Railroad Company and the receivers, in which it detailed the facts concerning the sale of the ticket to Connell, its subsequent litigation with him, its payment of his judgment, and the amount of its disbursements for necessary expenses in the course of that litigation. Its prayer was that its claim be

allowed, and that the receivers be directed to reimburse it from the funds in their hands.

Answer of Wabash Company.

To the amended petition of intervenor, the Wabash Company answered (printed record, p. 114) to the following effect:

First. That the sale of the ticket to Connell was not the proximate cause of the recovery of his judgment, but that Connell recovered his judgment on account of the unnecessary and excessive force used by the servants of the Pennsylvania Company in ejecting him from the train; and

Second. That if the Pennsylvania Company had any action against the Wabash Company, on account of the alleged wrongful sale of the ticket to Connell, it was cognizable only in a court of law, and that a court of equity had no power to grant the relief prayed for.

Answer of Receivers.

To the amended petition, the receivers answered (printed record, p. 111), in effect, as follows:

First. They disclaimed all knowledge as to the alleged sale of the ticket to Connell by the Wabash Company, and averred that if such unauthorized sale took place as alleged, it was long before their appointment, and that any claim of the Pennsylvania Company on account thereof was not entitled to any priority of payment over the other general unsecured indebtedness of the Wabash Company, existing more than six months before their appointment; and

Second. They averred that the judgment recovered by Connell against the Pennsylvania Company was

on account of the excessive and unnecessary force used by the servants of the Pennsylvania Company in ejecting him from the train, and not from the alleged wrongful act of the Wabash Company in selling him the ticket.

PETITION DISMISSED.

Upon the final hearing of the case, the Circuit Court of the United States for the Northern District of Illinois dismissed the petition with costs, and thereupon the Pennsylvania Company appealed to this court.

POINTS.

1st. As a proceeding against the Wabash Railroad Company, the intervening petition was properly dismissed, because the wrong alleged to have been committed by the Wabash Company in selling the ticket to Connell, was the subject of a legal action in which the parties were entitled to a jury trial.

The appointment of receivers did not affect the right of the Pennsylvania Company to prosecute an action at law against the Wabash Company for a wrong previously committed.

High on Receivers, 2d Ed., Sec. 397, and cases cited;

Beach on Receivers, 1st Ed., Sec. 412, and cases cited.

Assuming the sale of the ticket to have been wrongful, then the Pennsylvania Company had an unliquidated claim against the Wabash Company for such damages as were the natural and proximate result of the wrongful act, but the demand was clearly the subject of a legal action in which the parties were entitled to a jury trial.

Scott vs. Neeley, 140 U. S. 106, and cases cited.

2nd. As a proceeding against the receivers and the property in their hands, the intervening petition was properly dismissed, because a court of equity could not adjudicate a disputed claim against the Wabash Company that constituted no lien upon the funds of the receivership.

Scott vs. Neeley, 140 U. S. 113, and cases cited;
Cates vs. Allen, 149 U. S. 458.

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3rd. The intervening petition was properly dismissed as to all the defendants, because there were no grounds on which the Circuit Court could have granted the relief prayed for. Neither the Wabash Company nor its receivers should respond for injuries wrongfully inflicted upon Connell by servants of the Pennsylvania Company.

The judgment recovered by Connell against the Pennsylvania Company was permitted to stand, only because there was evidence tending to show that his injuries were wrongfully, and even wantonly, inflicted

For first opinion Supreme Court of Illinois, see printed record, page 67;

Same case, 112 Ill. 295;

For second opinion, see 127 Ill. 414.

For stipulation, to the effect that the second opinion shall be considered as evidence in this court, see printed record, page 118.

ARGUMENT.

I.

As a proceeding against the Wabash Railroad Company, the intervening petition was properly dismissed, because the wrong alleged to have been committed by the Wabash Company in selling the ticket to Connell was the subject of a legal action in which the parties were entitled to a jury trial.

(*a*) Intervenor seems to have proceeded, from the outset in this case, upon the theory, that no suit at law could have been maintained against the Wabash Company after a court of equity had appointed receivers over its property.

While it is true that property cannot, for reasons well understood, be taken out of the hands of a receiver and sold under execution and delivered to a purchaser, yet that rule does not prevent one, who has a legal claim against a person or corporation whose property has been placed in the hands of a receiver, from prosecuting his action at law and recovering a judgment, after which he may intervene and have his claim allowed, according to its rank as a lien, or he may wait until after the receivers are discharged, and then levy his execution and sell in the usual way. Such has been the universal practice, and we have seen nothing to the contrary in any of the books.

In *High on Receivers* (2d Ed., Sec. 397), the rule on the subject is stated as follows:

"In an action against a railway company to recover damages for personal injuries, defendant cannot plead, either in bar or in abatement of the action, that at the time of beginning the suit the company was in the

hands of a receiver, since the appointment of a receiver does not impair the jurisdiction of the court over the defendant company, or over the subject-matter of the action."

And in *Beach on Receivers* (1st Ed., Sec. 412), the authorities are collected, and the author states the rule as follows:

"Although, upon the appointment of a receiver, the corporation is enjoined from the exercise of its corporate franchises and deprived of its property, and thereby becomes, for the practical purposes of its creation, non-existent, it, nevertheless, cannot be held to be actually dissolved until it is so adjudged and determined by judicial sentence. Its stockholders continue their existence *qua* stockholders, and its contracts may be enforced against it. The existence of the corporation is not destroyed, or suspended, by the action of a court of equity in taking possession of its property and franchises, and it may be sued upon all causes of action upon which it may be or become liable *in personam*, no license from the court being a condition precedent to the bringing of such actions; but a judgment thus obtained cannot be satisfied from property in the hands of the receiver, except through the administering assistance of the court appointing him. After the property is returned to its custody the judgment can be enforced against it in the usual way on final process."

It is not pretended that the Pennsylvania Company had other than *a mere legal claim* for damages against the Wabash Company for the alleged wrongful sale of a ticket to Connell, nearly four years before the receivers were appointed. If such claim existed, the appointment of receivers did not in any way interfere with the prosecution of a suit at law and the recovery of a personal judgment, but upon the issues in such a case the defendant was clearly entitled to a jury trial.

Especially is that true in a Federal Court, where, in all legal actions, the right of trial by jury is a constitutional one.

In *Scott vs. Neeley* (140 U. S. 106) a claim cognizable *at law* was blended with a demand for equitable relief, which practice was allowable under a State statute; but this court dismissed the bill, and in doing so it said:

"In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal Courts. Uniting with a demand for its payment under the statute of Mississippi, a proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it. * * * * * * * * * * * * And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity. *Hipp vs. Babin*, 19 Ho. 271, 278; *Lewis vs. Cocke*, 23 Wall. 466, 470; *Killian vs. Ebbinghaus*, 110 U. S. 568, 673; *Buzard vs. Houston*, 119 U. S. 347, 351. All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal Courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some State courts, by virtue of State legislation, equitable

relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States."

And so here, the bringing of the Wabash receivers into the case as defendants, did not in any way impair *the right of the Wabash Company* to a jury trial. The fact that pending a receivership an execution could not be levied, does not affect the question, for receiverships may be only temporary, and after the receivers are discharged, execution can be levied as in ordinary cases. The right to a jury trial to determine the amount of a legal demand, may be quite as important to one laboring under some temporary embarrassment, as it is to one not so situated.

(*b.*) Counsel for appellee contends that the foregoing rule does not apply in this case, because, he says, the Wabash receivers took possession of *all the property of the company*. But if we were to concede the soundness of his proposition, and agree that the right to jury trials for the adjudication of mere legal claims did not exist where receivers were appointed over *all the property* of a defendant, yet that rule cannot be successfully invoked here, because this record contains no order from which the court below could see that the Wabash receivers took possession, or were authorized to take possession of *all the property* of the Wabash Company. This record does not contain the order of the Circuit Court of the United States for the Eastern District of Missouri appointing the receivers. It contains the bill filed by the Wabash Company in that court, from which it appears that the company prayed for the appointment of receivers over all its

property, but it does not follow that the court so ordered. The record also contains (printed record, p. 16) the order entered upon an ancillary bill, filed by the Wabash Company in the Circuit Court of the United States for the Northern District of Illinois, in which the receivers were ordered to take possession of all the property of the company *in the State of Illinois*. But that also falls short, because the original bill, which is found in the record, shows that the railroads and property of the company were situated *in five other States*.

So that, whatever the rule may be, in cases where receivers, under proper orders, take possession of all the property of a defendant, there is nothing in the record from which this court can see, or from which the court below could see, that this case falls within the rule invoked.

II.

As a proceeding against the receivers and the property in their hands, the intervening petition was properly dismissed, because a court of equity could not adjudicate a disputed claim against the Wabash Company that constituted no lien upon the funds of the receivership.

If we were to admit the truth of all that is stated in the intervening petition, it could not then be said that the Pennsylvania Company had any *acknowledged debt* that constituted a lien on the funds of the receivership, and unless it had *such debt and lien*, its petition was properly dismissed.

(*a*) A proceeding against a receiver is nothing more or less than a proceeding in a court of equity to enforce a lien against the property of a debtor, and it has never

been held that a creditor could go into a court of equity and claim satisfaction out of the property of his debtor, until he has first established his demand in a court of law, and acquired, in some manner, a lien on the fund. Courts of equity enforce liens, but they do not determine legal controversies. The rule applicable in such cases was stated in *Scott vs. Neeley* (140 U. S. 113), where the court said:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon created by contract or by some distinct legal proceeding. *Smith vs. Railroad Company*, 99 U. S. 398, 401; *Angell vs. Draper*, 1 Vern. 398, 399; *Shirley vs. Watts*, 3 Atk. 200; *Wiggins vs. Armstrong*, 2 John Ch. 144; *McElwain vs. Willis*, 9 Wend. 548, 566; *Crippen vs. Hudson*, 3 Kernan, 161; *Jones vs. Green*, 1 Wall 330."

What was said by the court on this point, in *Scott vs. Neeley*, *supra*, was quoted with approval in the more recent cases of *Cates vs. Allen*, 149 U. S., p. 458, and it needs no argument, we think, to show that the rule announced in those cases ought to determine this one.

(*b*) In the first paragraph of his brief, counsel for appellant refers to a number of cases in this court that grew out of the Wabash receivership, for the purpose of showing that the court below *entered upon the administration* of the Wabash estate and adjudicated many unliquidated demands. But it will be found,

upon examination, that all those cases were against the funds and not against the receivers as individuals. They all involved the adjustment of receivership obligations, incurred *in the management of the receivership property*, and were, for that reason, equitable liens upon it; or they were prosecuted by parties who claimed such liens, and in every case, where liens were found *not to exist*, the petitions were dismissed, as was this one in the court below, and the parties remitted to their remedies at law. There is nothing in any of the cases cited in conflict with *Scott vs. Neeley*, or *Cates vs. Allen*, *supra*, or which tends to show that the Circuit Court erred in dismissing this petition.

III.

The intervening petition was properly dismissed as to all of the defendants, because there were no grounds on which the Circuit Court could have granted the relief prayed for. Neither the Wabash Company nor its receivers should respond for injuries wrongfully inflicted upon Connell by a servant of the Pennsylvania Company.

What the Pennsylvania Company sought in this proceeding, was the recovery of a large sum paid out by it *on account of* the wrongful acts of its own servants, in expelling Connell from the train with unnecessary force.

There is no suggestion that the Wabash Company had not accounted, or that it was unwilling to account, to the Pennsylvania Company for the money received from the sale of the ticket, or for one full fare from Philadelphia to New York, which was all the damage

it could possibly have suffered, if it had carried Connell through, instead of ejecting him. But this intervention was not to recover the value of a ticket wrongfully sold by the Wabash Company, and there is no averment ~~or proof~~ as to what that value was.

That there may be no misunderstanding as to what the Pennsylvania Company is now seeking to recover, we quote from page 20 of appelant's brief, where he says:

"The claim is not for unliquidated damages. It involves only the question of right to be reimbursed the amount which it has unnecessarily and unreasonably paid out and expended in the defense of a law suit, the defense of which belonged to the Wabash Railroad Company."

We accept that statement, in so far as it relates to the object of this suit, but we deny that the defense of that suit belonged to the Wabash Company.

The facts are these: The Wabash Company sold a ticket to Connell, which on its face gave Connell the right to be carried from Philadelphia to New York over the Pennsylvania Road, and it follows, as a matter of course, that if the ticket *did not, as between him and the Pennsylvania Company*, entitle Connell to be carried on the Pennsylvania Road, that then the Pennsylvanin Company could have refused to carry him, and it could have rightfully expelled him from its cars without unnecessary force, in which event Connell would have had his action against the Wabash Company for selling him a worthless ticket. But on the other hand, if the ticket sold to Connell, *as between him and the Pennsylvania Company*, gave him a right to be carried over the Pennsylvania Road, *then it was*

wrong for the Pennsylvania Company to expel him, as they did. If Connell was rightfully there under his ticket, they should have carried him, and then, if the ticket was wrongfully sold, the Pennsylvania Company would have had an action against the Wabash Company for any damages sustained in consequence of that wrongful act, but in no event should the Wabash Company be held liable for the acts of the Pennsylvania Company in wrongfully expelling Connell from their train, if he was rightfully there under a ticket, good as between him and them.

It therefore becomes necessary to inquire whether Connell was rightfully or wrongfully on the train, and in the litigation between Connell and the Pennsylvania Company there was an adjudication of that question.

The case of *Connell vs. Pennsylvania Company* went twice to the Supreme Court of Illinois. The first opinion delivered in the case is found in this record at page 67, and it is stipulated (P. R. 117) that the opinion of the Supreme Court of Illinois upon the *last hearing* (127 Ill. 414) might be referred to as evidence in this case.

From an examination of those opinions, it will be seen that upon the first trial Connell recovered a judgment for fifteen thousand dollars, which was reversed in the Supreme Court, because there was no evidence, *upon that trial*, of any wanton or malicious injury. The court held, however, that Connell was rightfully on the train, and in passing upon an instruction with respect to the measure of his damages, the court (pages 70 and 71, printed record) said:

"Had appellee paid the fare demanded, he could have sued the company and recovered for breach of contract. Had he left the train when the conductor refused to receive the ticket, and ordered him to leave, he might have sued and recovered for all the damages sustained in consequence of the acts of the conductor in expelling him from the train. But can he recover for the force used by the conductor, which he, by his own act, induced the conductor to resort to in order to put him off the train? * * * We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily incurred thereby, as well as reasonable damages for the indignity in being expelled from the train."

If Connell had been wrongfully on the train, under a worthless ticket that did not entitle him to be carried from Philadelphia to New York, the court could not, and would not have held that if he had paid his fare he could have recovered for a breach of contract; nor could it have held, that if Connell had left the trainwhen the conductor refused to receive his worthless ticket, and ordered him to get off, he would have had an action for all damages sustained in consequence of the act of the conductor in ejecting him? Surely, if he had been there without legal right, he would have been entitled to no such remedies.

Upon the second trial Connell recovered a judgment for seven thousand dollars, and upon that appeal the Supreme Court of Illinois (127 Ill. 419) affirmed its previous rulings, with respect to his rights under the ticket, and refused to reverse the judgment, *upon the*

sole ground that upon the last trial there was evidence tending to show, not only that the conductor used unnecessary force in ejecting him, but that Connell was wantonly and maliciously injured. On that point we quote from the opinion (page 423), as follows:

"If there was no evidence whatever tending to prove willful or wanton conduct on the part of those in charge of the train, an instruction submitting that question to the jury might be regarded as erroneous, as the instructions to a jury should be predicated upon the evidence. In the Appellate Court, where the evidence in all cases is reviewed and passed upon, in remarking upon the evidence, it is said: 'It was an appropriate question for the jury, under all the evidence, whether the force used by the servants of appellant in ejecting appellee was unjustifiably violent and excessive, and whether such injuries as he sustained during the expulsion were wantonly and maliciously inflicted. The evidence tended to show that appellee received injuries from which serious results followed, and while there is some conflict as to what was said and done by the conductor prior to and during the expulsion, we cannot say that the conclusion reached by the jury is without support in the evidence.' We have examined the evidence as it now appears in the record, and while it may be slight, we are not prepared to hold that the Appellate Court has placed an incorrect construction upon it."

Now, upon a record showing that the judgment recovered by Connell was permitted to stand only because their was evidence tending to show that the force used in expelling him from the train was unjustifiably violent and excessive, and that the injuries he received were wantonly and maliciously inflicted, on what possible ground could the court below have held, in this case, that the Wabash Company, or the receivers,

should reimburse the Pennsylvania Company for the amount of the judgment, or the cost of the litigation? As the claim was without any substantial merit, either in law or equity, the petition was properly dismissed as to all the defendants, and the judgment of the Circuit Court should be affirmed.

WELLS H. BLODGETT,

Attorney for Appellee.

157-225

FILED.
JAN 18 1895
JAMES H. McKENNEY,
CLERK.

157-225

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1894.

No. 158.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO., and SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of said Company,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY BRIEF FOR APPELLANT.

GEO. WILLARD,
SOLICITOR.

BERNARD & MILLER, PRINTERS.

IN THE

SUPREME COURT OF THE UNITED STATES.

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY BRIEF FOR APPELLANT.

It is not denied by counsel that the Wabash company violated appellant's instructions and its own promise to discontinue further sale of tickets after December 1, 1880.

The claim is, *first*, that appellant had no remedy by way of intervention; and *second*, that some of the costs and expenses sought to be recovered by appellant, resulted from alleged wrong doing on its behalf.

I.

THE PROCEEDING BY INTERVENTION WAS PROPER UNDER THE CIRCUMSTANCES.

Counsel, in controverting this proposition rely on *Scott* v. *Neeley*, 140 U. S., 106, and *Cates* v. *Allen*, 149 *id.*, 451.

Those cases, however, are distinguishable from the one now before the court. (See appellant's brief, page 17.)

The proceeding by appellant was not by original bill, but by the intervention in a suit in equity, whereof the court had already taken jurisdiction to administer the estate of the Wabash company, pursuant to the prayer of the Wabash company itself. (See appellant's brief, pages 10–14.)

It is undeniable that the bills filed by the Wabash company were for the judicial administration of its estate and the winding up of its business, the company being insolvent, and there being reason, in the interest of its creditors, that its assets should not be scattered, or the unity of its lines be broken. One of the declared purposes of the bills was to prevent a multiplicity of suits by creditors and to give them all an opportunity to present their claims and have them determined and the assets applied in payment, according to right of priority.

Counsel states (brief, 11) that the appointment of the receivers did not affect the right of appellant to prosecute an action at law against the Wabash company. The statement is too broad.

The filing of the ancillary bill, and the jurisdiction thereupon taken of the subject-matter and appointment

of receivers operated to suspend appellant's right of attachment under the laws of Illinois. (See appellant's brief, pages 26, 27.)

Appellant's right of attachment having been suspended, but having instead, under the scope and prayer of ancillary bill, an opportunity to proceed against the assets of the estate by way of intervention before the court, it is not seen upon what authority appellant must seek the insolvent in a distant state for the purpose of getting a personal judgment and then coming back to Illinois for payment. In such case, would proceedings in the administration of the estate wait upon the uncertainty of appellant's success in finding the insolvent corporation and getting personal service upon it? Of course not. While, therefore, the insolvent was being sought in Missouri, the administration of its estate in Illinois might become complete and the appellant be shut out of all participation therein.

The Wabash company, by the filing of its original and ancillary bills, gave up in effect all claim to corporate life except as it might become necessary in the interest of its creditors to use its name or corporate functions in the administration of its estate. Said company has no standing in its opposition to the adjudication sought by appellant's intervention. Under the plainest rules of equity it would seem that it ought not to obstruct, but should hasten adjudication and payment of the loss occasioned by its bad faith and double dealing.

Counsel's assertion, page 11, that appellant's claim constituted no lien upon the funds of the receivership, is not supported by the record. It is in evidence that the Baltimore and Ohio company is obligated to the Wabash

company's estate in such amount as the estate may be required to pay to appellant upon its claim. And within the scope of the ancillary bill the court can have recourse to that obligation if necessary for appellant's benefit. (See appellant's brief, pages 18, 19.)

Counsel suggests that the original bill shows property of the Wabash in five different states and that in some of them appellant might have found assets not in possession of receivers. (Appellees' brief, page 17.)

But the original bill also shows that the insolvent would, upon the court taking jurisdiction thereof, "file "like bills in the Circuit courts of the United States of "each of the districts into which such lines extended, "praying such courts to take ancillary jurisdiction of said "cause and to aid in administering said property and "disposing of the same according to the rights of all "parties." (Print. 14.)

Jurisdiction of the subject-matter of the intervening petition is not dependent upon whether all of the insolvents' property outside of Illinois was placed in the possession of receivers.

The purpose of the original bill and the ancillary bill filed in the court below, included the determining of the rights of creditors, as well as the question of their liens.

II.

AS TO WHETHER A PORTION OF THE COST AND EXPENSE SOUGHT TO BE RECOVERED WAS THE RESULT OF WRONG ON THE PART OF APPELLANT.

Counsel for appellees contends, brief, page 19, that the petition was properly dismissed because there were "no grounds" on which the relief prayed for could have been granted. That the "sum paid out" was on account of unnecessary force used in expelling Connell from the train.

The contention is unsound.

It will be observed that the amount reported by the master for which appellant was entitled to be reimbursed on account of expenses down to the 13th March, 1885. including the first appeal to the Supreme court was $2,577.50. (Print., 78.)

No part of those expenses were attributable to any wrong done on behalf of appellant. The Supreme court held that in the record there was no evidence of any excessive force having been used, or bad faith manifested by appellant.

Outside of the question of excessive force and bad faith as an element of damages, the Supreme court held that there were three other grounds upon which recovery might be had. The subject is referred to in Appellant's supplemental brief, pages 3-5, where it is stated that the attorneys for both sides admitted that the facts recited in the record on the second appeal were substantially the same as on the first appeal. There is very little if anything in the opinions of either, the Supreme

or Appellate court evidencing that the judgment below was affirmed because of alleged proof of excessive force or appearance of bad faith.

Note the words used in the opinion of the Supreme court, as shown in appellee's brief on page 23.

"If there was *no evidence whatever* tending to prove wilful or wanton conduct * * * then an instruction submitting that question to the jury *might* be regarded as erroneous."

It will be observed that the court does not say that it would necessarily be regarded as erroneous. The question would be determined in view of all the surrounding circumstances.

Note also the words in the opinion of the Appellate court as quoted by the Supreme court, appellees' brief, page 23:

"It was an appropriate question for the jury under all the evidence, whether the force used * * * was unjustifiably violent and excessive, and whether such injuries as the plaintiff sustained during the expulsion were wantonly and maliciously inflicted. The evidence tended to show that appellee received injuries from which serious consequences followed, and while there is some conflict as to what was said and done by the conductor prior to and during the expulsion, we cannot say that the *conclusion reached by the jury is without support in the evidence.*"

In other words, there being other elements of damage upon which the jury might assess the amount awarded, the court could not say that their conclusion was without support in the evidence.

The question which the honorable Supreme court and Appellate court did not decide, viz.: whether upon the evidence the jury assessed any damages on the theory of

excessive force and wanton and malicious intent, will be a proper one for consideration in the court below when the *amount* which appellant should recover upon its petition is determined. Counsel does not claim that the entire amount of the verdict and judgment was assessed on that alleged ground. As pointed out in supplemental brief, page 5, the other elements of damage, especially the element of "indignity" in being expelled from the train may have been the only basis upon which the jury actually awarded their verdict.

But the rule of evidence which would allow Connell to recover for supposed excessive force will not shield appellees in the present proceedings. Connell was not a wrong-doer. As between himself and appellant he had a right to be carried on the ticket which he presented. Not so as between the Wabash company and appellant. The Wabash company sold the ticket, not only in disobedience of appellants' instructions to discontinue such sales, but secretly and in violation its promise to obey.

The Wabash company stands in the situation of one who, by an act of fraud or wrong-doing, has put another in danger.

Having by its own wrong put appellant in a position where its conductor, in the discharge of his duty, under his orders not to honor the ticket, might unintentionally use a little more force than would appear to another actually necessary, the Wabash Company cannot set up the slight excess as an excuse or justification of its own wrong.

GEO. WILLARD,
Solicitor for Appellant.